







# CASES DECIDED

IN

# THE COURT OF CLAIMS

OF

# THE UNITED STATES

APRIL 6, 1936, TO DECEMBER 6, 1936

WITH

## ABSTRACT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

CHARLES F. KINCHELOE

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# CASES DECIDED

IN

## THE COURT OF CLAIMS

April 6, 1936, to December 6, 1936

## GIUSEPPE SANGUINETI, OLGA SANGUINETI, AND ANGELA SANGUINETI, HEIRS AND LEGATEES, AND LUIGI MAZZINO AND ALESSANDRO FAVA, AS EXECUTORS, UNDER THE LAST WILL AND TESTAMENT OF ANDREA SANGUINETI FU GIUSEPPE, v. THE UNITED STATES

[No. D-839. Decided April 6, 1936]

*On the Proofs*

*Jurisdiction; claim of citizen of Italy.*—Under the laws of the Kingdom of Italy a citizen of the United States is permitted to maintain a suit on a claim against that nation, and a citizen of Italy has therefore the reciprocal right to maintain a suit in the Court of Claims on a claim against the United States.

*Authority of chartering committee of the United States Shipping Board during the World War.*—The comprehensive authority conferred upon the chartering committee created by the United States Shipping Board under authority of the act of July 18, 1918, and the President's proclamation of July 29, 1918, pursuant thereto, did not limit the committee's actions to inflexible rules and regulations, nor render its approvals or disapprovals of charter parties, as well as its fixing of charter-party freight rates, irrevocable; the committee possessed sufficient authority to meet emergency situations arising in the course of the performance of its duties.

*Liability of United States on agreement by chartering committee of Shipping Board; interest.*—Where a vessel belonging to a citizen of Italy, and under charter to a citizen of Denmark, arrived in the harbor of New York in October 1918, with a cargo from Africa which could not be discharged by the vessel for the reasons that the owner did not have the required import license, the charter party had not been approved by the proper United States authorities and a balance of freight charges

secured by a lien on the cargo had not been paid, it was within the authority of the chartering committee created by the United States Shipping Board under the act of July 18, 1918, and the President's proclamation of July 29, 1918, pursuant thereto, to enter into an agreement for approval of the charter party and discharge of the cargo upon deposit with it of the freight charges due, for their proper and lawful disposition; and where the freight charges so deposited were turned over by the committee to the Shipping Board and held by the United States Treasury to the credit of the Board, the owner of the vessel is entitled to recover in a suit therefor against the United States, but may not recover interest.

*The Reporter's* statement of the case:

*Mr. Homer L. Loomis* for the plaintiffs.

*Mr. J. Robert Anderson*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Ralph H. Hallett* was on the brief.

The court made special findings of fact as follows:

1. Andrea Sanguineti fu Giuseppe, the original plaintiff, died June 30, 1929. At his death his property, including the claim herein sued on, descended to Giuseppe Sanguineti, Angela Sanguineti, and Olga Sanguineti, as the sole heirs and legatees under his will. Luigi Mazzino and Alessandro Fava are the executors under the will. On January 18, 1930, Giuseppe Sanguineti, Angela Sanguineti, and Olga Sanguineti, as heirs and legatees, and Luigi Mazzino and Alessandro Fava, as executors, were substituted herein as plaintiffs.

Andrea Sanguineti fu Giuseppe until his death was a citizen of the Kingdom of Italy, the laws of which country permit a citizen of the United States to maintain without restrictions suits similar to this against the Kingdom of Italy.

2. During the entire time herein concerned, Andrea Sanguineti fu Giuseppe was the owner of the sailing vessel *Jolanda*, which flew the Italian flag and carried an Italian crew. During the entire year of 1918 the *Jolanda* was under requisition by the Italian Government for the transportation of coal from the United States to an Italian coaling station located at Dakar, on the West Coast of Africa. The requisition of the vessel by the Italian Government permitted the *Jolanda* to carry cargoes of her own on the west-

bound trips to the United States, with the provision that on said west-bound trips all costs of operation were to be borne by her owner. The sole interest of the Italian Government on west-bound trips consisted of 20 percent on the gross amount of freight.

**3.** On May 19, 1918, with the permission of the Italian Government, the owner of the *Jolanda* chartered her to V. Q. Peterson, a citizen of Denmark, for a west-bound trip to the United States for the transportation of a cargo of cocoa beans from Accra, Gold Coast, West Africa, to New York, whence she was to return on her east-bound trip to Dakar with a cargo of coal for the Italian Government.

The charter to Peterson was at the rate of £15 per English ton taken, £5,000 to be paid on the signing of the charter party, which was done, £8,000 on the completion of the loading, which was accordingly paid to her captain, the balance to be paid to the Italian consul at the port of unloading. All expenses of loading and unloading were for the account of the charterer, who was also to assume for his account all steps necessary to secure the license or permission to export or import her cargo. The vessel was to have a lien on the cargo for the payment of the freight due. The charter, among other provisions, contained the following:

> In case the American Shipping Board may impose any restrictions of chartering price and that these restrictions may be applicable to this contract, same will be valid just the same, but the decrease of price required will produce these consequences:
>
> If the same means a decrease in freight of more than 5 pounds per ton, the laydays will apply to 200 tons per day, and the demurrage to 175 lbs. per day.
>
> If the same means a decrease in freight to one-half or less, the laydays will apply to 300 tons per day and the demurrage to 250 lbs. per day.
>
> In this case the reductions or restrictions to be made will take place at the port of destination in North America.

**4.** On June 30, 1918, V. Q. Peterson, charterer, subchartered the *Jolanda* to F. W. and W. Swanzy, of London, England, at the rate of £20 Sterling per ton, to carry a cargo of cocoa beans from the Gold Coast, West Africa, to New York.

As soon as the *Jolanda* was loaded, about August 13, 1918, Peterson, charterer, collected from F. W. and W. Swanzy the subcharter freight at the rate of £20 Sterling per ton.

**5.** The *Jolanda* sailed from the Gold Coast, Africa, on August 13, 1918, and arrived at New York on October 30, 1918. Lykes Brothers, Inc., was the New York agent of Peterson. The cargo of cocoa beans was consigned to Alexander Roberts & Company, whose duty it was to furnish a pier at New York for the discharge of her cargo. The balance of the charter freight estimated to be due from Peterson to her owner was $87,917.20.

**6.** Prior to the execution of the charter party at Dakar, on May 19, 1918, the importers of the cocoa beans had procured an import license therefor. Prior to the execution of this charter, neither the owner, the Italian Government, nor the charterer made application to the United States War Trade Board or the chartering committee of the United States Shipping Board for a license to import or for the approval of the charter party.

On July 8, 1918, the United States War Trade Board revoked all outstanding import licenses for carrying cargoes that might be shipped after July 20, 1918.

On July 17, 1918, the importers of these cocoa beans applied to the War Trade Board for a renewal of their original license which on August 13, 1918, was granted, subject however to the approval of its freight rates by the chartering committee.

**7.** On September 6, 1917, the United States Shipping Board authorized the appointment of a special chartering committee.

On September 29, 1917, the United States Shipping Board appointed three persons as members of the chartering committee, to which committee all applications for the approval of charters were to be referred.

On October 12, 1917, the President of the United States by Executive order established the War Trade Board, with authority to issue or refuse licenses for exportation and importation. The War Trade Board established regulations concerning exportation and importation of certain articles, under which importers of beans were required to procure

licenses for such importations from the War Trade Board, and the unloading without such license of any vessel containing such beans was prohibited.

On July 29, 1918, the President of the United States by proclamation designated the United States Shipping Board as the agency to exercise the powers to prescribe charter rates and freight rates, and authorized the Shipping Board to exercise such authority through such other agency as the Board might designate.

On August 7, 1918, the United States Shipping Board by resolution designated the chartering committee as the agency to exercise all the powers so conferred on the Shipping Board.

8. Following the execution of the charter party at Dakar, on May 19, 1918, correspondence was exchanged between the Italian Ministry of Shipping at New York, acting on behalf of the owner of the *Jolanda*, and the chartering committee. The chartering committee was informed of the provisions of the charter and was requested to approve same. On May 28, 1918, the chartering committee stated that it could not approve a rate in excess of $22 per ton, and that the committee was taking the matter up with the authorities at Washington, whose action must be awaited. The chartering committee advised the Italian Ministry of Shipping at New York that nothing further could be done until the *Jolanda* arrived at New York, when it would "endeavor to straighten out the matter, together with the Food Administration and the War Trade Board." On May 28, 1918, the *Jolanda* had not been partially loaded, and her loading was not completed until about August 13, 1918.

At the time the charter party was signed at Dakar, neither the owner of said vessel nor his agent was aware that the chartering committee had established a maximum charter or freight rate of $22. The charter party was signed with the knowledge and approval of the United States consul at Dakar.

9. On her arrival at New York the *Jolanda* was not allowed to discharge her cargo until both the charter party and the subcharter party were approved by the chartering committee.

On the completion of her loading, on August 13, 1918, Peterson, charterer, had paid to the owner of the *Jolanda* $61,880, which sum was greater by $5,880 than the amount that would have been due in all from Peterson to the owner if the maximum charter rate of $22 per ton had been enforced by the chartering committee. Peterson therefore contended that the $22 rate was proper and that he was entitled to a refund of $5,880 from the owner. On the other hand, the Italian Ministry of Shipping, on behalf of the vessel owner, asserted a lien on the cargo for the balance of freight estimated due, $87,917.20, and refused to permit discharge of the cargo until that sum was paid. Both the chartering committee and the Italian Ministry of Shipping desired that the *Jolanda* discharge her cargo soon in order to pick up a cargo of coal for her east-bound voyage.

**10.** An oral agreement was entered into between the chartering committee, the Italian Ministry of Shipping, acting for the owner, and Lykes Brothers, Inc., acting for the charterer, by the terms of which it was agreed that the chartering committee would approve the charter party and permit the owner to discharge the cargo, and that Lykes Brothers, Inc., agents for Peterson, the charterer, would pay to the Italian Ministry of Shipping, representing the owner, $87,917.20, balance of freight charges due the owner under the charter party. The Italian Ministry of Shipping was then to deposit this sum with the chartering committee for safe-keeping and await its final disposition, having regard to the respective rights of the parties to the agreement by the proper American authorities. The $87,917.20 was the estimated amount of charter freight due, and the actual amount due was to be decided upon after the outturn of the cargo.

This agreement was carried out and the chartering committee approved the charter party involved; Lykes Brothers, Inc., representing the charterer, gave its check for $87,917.20 to the Italian Ministry of Shipping, acting for the owner of the vessel, and the Italian Ministry of Shipping delivered the check on November 8, 1918, to the chartering committee. The check was payable to the Treasurer of the United States. It was thereafter returned and a new check was drawn, payable to the Shipping Board instead of the Treasurer of the

United States. This was done at the suggestion of the chartering committee because of a statement made that if paid into the Treasury of the United States an act of Congress would be required to get it out.

**11.** At the time the *Jolanda* arrived at New York the sum of $87,917.20 due the owner from Peterson, charterer, was the only item of charter or freight due and unpaid from any person to any other person in connection with the transportation of the cargo, under either the charter or the sub-charter.

The chartering committee waived its demand that the Italian Ministry of Shipping collect the freight moneys theretofore paid in Africa, which were in excess of the chartering committee rates.

**12.** The Shipping Board, upon receipt of the check for $87,917.20, deposited the same with the Treasurer of the United States, by whom it was cashed, and on November 29, 1918, this sum was credited to the account of the Shipping Board.

Subsequent to the delivery of the check, the actual outturn of the cargo disclosed that the estimated balance of charter freight due in the sum of $87,917.20 was in excess of the balance actually due, by the sum of $2,412.46. This excess was repaid by the Italian Ministry of Shipping to Lykes Brothers, Inc., on January 21, 1919. The Italian Ministry of Shipping made demand for the return by the chartering committee of the excess sum, but same has not been returned.

The interest which the Italian Government originally had in the charter freights due under the charter party—20 percent of the gross freight—was collected in full from the owner of the *Jolanda* out of the £13,000 paid to the Italian Consul at Dakar at the time the loading of the *Jolanda* was completed. The Italian Government has no interest in the claim herein sued on.

**13.** On May 23, 1924, the commercial attaché of the Italian Embassy, Washington, in a communication to the general counsel, U. S. Shipping Board, included the claim of $87,917.20, along with some twenty other claims which, together with claims of the United States against Italy, were under consideration.

Numerous attempts were made by and on behalf of the owner of the *Jolanda*, both through the Italian Ministry of Shipping and through counsel representing the vessel owner, to secure a refund of the moneys so deposited. Much correspondence and many conferences were had between such representatives of the vessel owner and the chartering committee, the United States Shipping Board and its counsel. No part of said moneys has been repaid to, on account of, or for the benefit of the owner or owners of the *Jolanda*.

**14.** Plaintiffs are the sole owners of the claim here sued on. There has been no assignment or transfer of said claim, or any part thereof, or interest therein, except as stated in finding 1 hereof. No other action on this claim has been taken by Congress or by any department of the United States Government, or in any other court seeking the return of said money, or granting of relief in lieu thereof.

The court decided that plaintiffs were entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

Andrea Sanguineti fu Giuseppe was all his life a citizen and resident of Italy. Prior to and during all the period of this claim up to the date of his death in 1929 he owned and operated the sailing vessel known as the *Jolanda*. During the year 1918 the *Jolanda* was under requisition to the Italian Government and directed to transport coal from the United States to the Italian coaling station located at Dakar, on the West Coast of Africa.

The owner of the vessel under the terms of the requisition was permitted to transport cargoes on her west-bound voyage to the United States on his own account, subject only to account for and pay over to the Italian Government 20 percent of the gross amount of freight charges received by him upon any such voyage.

May 19, 1918, the owner entered into a charter party with V. Q. Peterson, a citizen of Denmark, to transport on the *Jolanda* a cargo of cocoa beans from Accra, Gold Coast, West Africa, to New York. The charterer Peterson was to pay freight at the rate of £15 per English ton of cargo transported and so far as herein pertinent was to pay the expense

incident to the discharge of the cargo at the point of destination, the vessel expressly reserving a lien upon the same until freight payments were completed.

The charter party also contained the following provisions essential to quote:

> In case the American Shipping Board may impose any restrictions of chartering price and that these restrictions may be applicable to this contract, same will be valid just the same, but the decrease of price required will produce these consequences:
>
> If the same means a decrease in freight of more than 5 pounds per ton, the laydays will apply to 200 tons per day, and the demurrage to 175 lbs. per day.
>
> If the same means a decrease in freight to one-half or less, the laydays will apply to 300 tons per day and the demurrage to 250 lbs. per day.
>
> In this case the reductions or restrictions to be made will take place at the port of destination in North America.

Peterson subchartered the *Jolanda* to F. W. and W. Swanzy, of London, realizing a gain of £5 per ton of cargo transported.

The *Jolanda* sailed from the Gold Coast on August 13, 1918, and arrived at New York on October 30, 1918. On her arrival an unpaid freight charge amounting to $87,-917.20 was due from the charterer to the owner, and this case involves the right of the plaintiffs to recover this sum from the United States under the facts of the case as found by the court.

The act of July 18, 1918 (40 Stat. 913), apropos this controversy, was a comprehensive war measure granting to the President plenary authority with respect to chartering of American vessels owned by citizens of the United States. This act forms the foundation upon which the case rests, and some of its provisions must be quoted:

> SEC. 5. That the President may, by proclamation, require that vessels of the United States of any specified class or description, or in any specified trade or trades, shall not be chartered unless the instrument in which such charter is embodied, and the rates, terms, and conditions thereof are first approved by him. Whenever any vessel is comprised in any such proclamation, it shall be

unlawful to make any charter thereof, or comply with or perform any of the rates, terms, or conditions of any charter thereof, or to operate such vessel under any charter, without first obtaining the approval thereof by the President.

Whenever any charter of such vessel is approved, it shall be unlawful, without the approval of the President first obtained, to make any alterations in such charter, or additions thereto or deletions therefrom, or to make or receive any payment or do any act with respect to such vessel, except in accordance with such charter.

SEC. 6. That the President shall have power to determine, prescribe, and enforce reasonable freight rates and the terms and conditions of affreightment which shall govern the transportation of goods on vessels of the United States, which shall be filed with the United States Shipping Board and open to public inspection. It shall be unlawful to charge or collect any compensation for the transportation of goods on any such vessel, or to enforce or attempt to enforce any terms or conditions of affreightment, or to make or receive any payment or do any act with respect to such transportation, not in accordance with the rates, terms, and conditions so prescribed, anything in any contract, whether heretofore or hereafter made, to the contrary notwithstanding.

SEC. 7. That the President shall have power to prescribe the order of priority in which goods shall be carried or other services performed by any vessel of the United States and to specify goods which shall be carried or to direct the voyage or employment of any such vessel and to make such rules, regulations, and orders, with respect to any such vessel, relating to the loading, discharging, lighterage, or storage of goods, or the procurement of bunker fuel, or any other matter relating to the receiving, handling, transporting, storing, or delivering of goods, as may in his judgment be necessary and proper for the efficient utilization of transportation facilities and the effective conduct of the war.

SEC. 8. That the President may by proclamation extend the provisions of sections five, six, and seven, or any of them, to any vessel of foreign nationality under charter to a citizen of the United States or other person subject to the jurisdiction thereof.

SEC. 10. That the President may by proclamation require that no citizen of the United States, or other person subject to the jurisdiction thereof, shall charter any vessel of foreign nationality unless the instrument

in which such charter is embodied and the rates, terms, and conditions thereof are first approved by the President. After the making of such proclamation it shall be unlawful for any such citizen or person to make any charter of any such vessel, or comply with or perform any of the rates, terms, or conditions of any charter thereof, or to operate any such vessel under any charter, without first obtaining the approval thereof by the President.

SEC. 16. That whoever does or attempts to do anything in this Act declared to be unlawful, or willfully violates any rule, regulation, or order issued under authority conferred herein, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both: Provided, That the district court of the Canal Zone shall have jurisdiction of offenses committed against the provisions of this Act within the Canal Zone.

On July 29, 1918, the President issued the following proclamation:

Now, therefore, I, Woodrow Wilson, President of the United States of America, acting under authority conferred in Section 5 of said Act, do proclaim that hereafter vessels of the United States, being full power driven vessels of 250 tons gross burden, or over, or sailing vessels with or without auxiliary power of 50 tons gross burden, or over, excepting vessels plying exclusively on the inland rivers and canals of the United States, vessels operating in the Great Lakes or other inland waters, and vessels operating exclusively in the coastwise trade of the United States, shall not hereafter be chartered unless the instrument in which such charter is embodied, and the rates, terms, and conditions thereof, are first approved by the President.

Under authority conferred in Section 8 of said Act, I do further proclaim that the provisions of said Section 5, and of this Proclamation, shall be and they are hereby extended to any vessel of foreign nationality under charter to a citizen of the United States or other person subject to the jurisdiction thereof.

Under authority conferred in Section 10 of said Act, I do further proclaim that hereafter no citizen of the United States or other person subject to the jurisdiction thereof, shall charter any vessel of foreign nationality unless the instrument in which such charter is embodied

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and the rates, terms, and conditions thereof are first approved by the President.

I do hereby designate the United States Shipping Board as the agency through which shall be exercised all power and authority conferred upon the President in Sections 5, 8, and 10 of said Act with respect to the classes or descriptions of vessels and the trades specified in this Proclamation. Such power and authority may be exercised by said United States Shipping Board through such agents or agencies as it may create or designate.

Nothing contained in this Proclamation shall be deemed to withdraw from the United States Shipping Board or the War Trade Board any authority now exercised, directly or indirectly, over foreign or American vessels, by virtue of powers conferred under Title VII of an Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes", approved June 15, 1917.

It is conceded that, in accord with the legislation and proclamation of the President quoted, a chartering committee was on August 7, 1918, designated by the Shipping Board and authorized to exercise the authority delegated to the Board by the President, and without going further into detail with respect to the governmental authority and regulations of the chartering committee it is sufficient to state that for the type of vessel similar to the *Jolanda* a freight rate of $22 per ton was established.

The *Jolanda* arrived in New York without an import license and without the approval of the chartering committee to its charter party with Peterson. The Italian Ministry of Shipping at New York had informed the chartering committee of the terms of the charter party and sought its approval. The chartering committee did not officially disapprove the charter party. The chartering committee took the position that it could not approve a freight rate in excess of the one fixed by it, and stated that the matter would be taken up with the authorities at Washington, and nothing further could be done until the *Jolanda* arrived at New

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York, when it would "endeavor to straighten out the matter, together with the Food Administration and the War Trade Board."

When the *Jolanda* arrived at New York the owner could not discharge cargo for three obvious reasons: He had not received the balance due him as freight charges; he possessed no import license, and the charter party with Peterson, as well as Peterson's assignee, had not been approved. So, manifestly, he was not allowed to do more than await developments. Of course, the owner of the vessel could have disregarded all the obstacles to a discharge of her cargo and sailed to a neutral port and by sale of the same realized the balance due him as freight.

To do this, however, he would have prejudiced the interest of his own and the United States Government, allies in war, by losing for the time being at least the services of a vessel then badly needed by both Governments. Therefore, all parties interested entered into an oral agreement, by the terms of which the chartering committee consented to approve the charter party, grant the owner a license to land and discharge cargo, whereupon Lykes Brothers, representing the charterer, were to pay to the Italian Ministry of Shipping the $87,917.20 due as freight charges, the latter to deposit the same with the chartering committee, there to remain and await its proper and lawful disposition.

This agreement was carried out. The chartering committee delivered the check for $87,917.20 to the Shipping Board at Washington and the Board deposited it with the Treasurer of the United States, by whom it was cashed and the Shipping Board's account credited with the same (Finding 12). Prolonged and repeated efforts have been made by the plaintiffs and their predecessor in title to recover the above deposit. The record does not disclose any claim upon the part of the United States to the money, but does disclose a voluminous correspondence with respect to a settlement of the controversy and a refusal to refund the same.

The defendant interposes a number of defenses. We think it important to discuss only two of them. These two are embodied in the following statement taken from de-

fendant's brief: "The Chartering Committee did not and could not make a contract for a return of the money exacted for permission to discharge the cargo transported on the *Jolanda* and as a penalty for violating United States laws and regulations. Where the power to make an express contract is wanting, no implied contract can arise."

This contention in its broadest aspect challenges the authority of the chartering committee to make any contract involving the return of money exacted by the same. It is manifestly predicated upon an assumption that the committee possessed lawful authority to fix the freight rates applicable to the charter party involved, and could exact a penalty from anyone seeking to or violating any order or regulation of the committee.

The defense is vulnerable. In the first place, the owner of the *Jolanda* was a citizen of Italy. The vessel was under requisition to the Kingdom of Italy and flew the Italian flag. The charterer was a citizen of Denmark and therefore neither the vessel nor the parties interested were subject to the jurisdiction of the United States except as hereafter stated. The chartering committee did not possess the authority to fix the terms of the charter party now under consideration. Its authority, however, did extend to the right of granting an import license to the owner of the vessel, and by refusing to approve any charter party, either foreign or domestic, and grant a license to discharge cargo the Committee could effectually prevent the *Jolanda* from landing at any port of the United States and dispose of her cargo.

The situation which confronted the owner of the vessel, the charterer, the Italian Ministry of Shipping, and the chartering committee, an agency of the United States, was one which in and of itself not only suggested the contract which was made but was the one and only solution of an unanticipated difficulty fraught with serious consequences to all parties concerned if not immediately adjusted and settled. The chartering committee did not want to unduly detain the vessel in port and thereby delay Italy's shipment

of needed coal. The owner was anxious to collect his freight and the charterer was equally anxious if he could to escape payment of what was due the owner. The war situation was critical and the parties in good faith acted wisely.

Was then what was done by the chartering committee within the scope of its lawful authority? The comprehensive authority conferred upon the committee in pursuance of the act of July 18, 1918, *supra*, did not limit its actions to inflexible rules and regulations, nor render its approvals or disapprovals of charter parties, as well as fixing charter party rates of freight, irrevocable. The committee undoubtedly possessed a latitude of authority to meet emergency situations and to act accordingly. We need not cite familiar cases to sustain this statement. If it were otherwise, the intent and purpose of the act of July 18, 1918, would have been unattainable.

The facts of this case indisputably attest the scope and intent of the agreement the parties entered into. The chartering committee was somewhat in doubt as to whether a charter party calling for a freight rate in excess of that prescribed therein should or could be approved. This doubt arose because of the citizenship of the parties and the nationality of the vessel, and therefore, as to its jurisdiction over the transaction, the doubt was to be referred to higher authority and in order to escape the delay incident to its solution the agreement was made. The chartering committee surrendered none of its authority and the parties were to be protected in their legal rights.

The chartering committee could not impose a money penalty upon either the owner or the owner's vessel whether the owner be a foreigner or a native, and especially could this not be done when both the owner and the vessel were foreigners, and in this instance the committee did not pretend to exercise such authority. We say this advisedly, for Peterson, the charterer, had paid to the owner of the *Jolanda* a sum in excess of the $22 freight rate fixed by the committee, and the most that could have been exacted by the com-

mittee of the owner upon this basis would have been $5,880, and assuredly if it had been exacted the money would have belonged to the charterer and not the United States.

We need not dwell at length upon the subject of penalties. Section 16 of the act of July 18, 1918, provided for the punishment of a violator of the same. A fine of not more than $5,000, imprisonment for not to exceed two years, or both, constituted the fixed penalties. There is not in this entire record the remotest suggestion, much less proof, that the owner of the *Jolanda* even contemplated a violation of the statutes; and that he consented to the depositing of the freight due him to escape criminal action, or that the committee accepted the same in lieu of proceeding under the statute as a punitive measure, is not in the slightest degree sustained.

One outstanding fact which conclusively exonerates the owner from any charge involving an intent to escape from or circumvent any provision of the act of July 18, 1918, is found in the provisions of the charter party itself, as disclosed in Finding 3. No objection has been made to this finding and the record sustains it. The owner, as well as the charterer, in making the charter party, expressly recognized the fact that if a valid law was in effect by which authorities of the United States could change the terms of the charter party, the parties to the same would comply therewith. We have heretofore quoted in this opinion the precise sections to which we now refer.

We are not concerned, as evidently the chartering committee was, over the amount of the freight fixed in the charter party. The parties to the charter party were competent to make the contract and the World War was flagrant, involving the high seas. It is difficult indeed to comprehend by what process of reasoning the balance of freight due the owner of the vessel became the property of the United States. The United States came into possession of the funds in virtue of an agreement lawfully entered into between its lawfully constituted agency to act in the premises and the parties to this case, whereby it was understood

and agreed that the lawful owner of the money should eventually have it.

The plaintiffs can not recover interest notwithstanding the money has been retained for a long period of years. The transaction as detailed precludes the contention that the money sued for was taken by the United States for a public use. The agreement effectually negatives such a contention. The acts of the parties were voluntary and in accord with an agreement.

The plaintiffs are entitled to a judgment for $87,917.20. It is so ordered.

WHALEY, *Judge*; WILLIAMS, *Judge*; LITTLETON, *Judge*; and GREEN, *Judge*, concur.

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## THE MARLIN FIREARMS CORP. v. THE UNITED STATES

[No. F-169. Decided April 6, 1936]

*On the Proofs*

*Patents; improvements in aircraft machine guns; validity.*—United States patent No. 1450653, for improvements in aircraft machine gun mechanism, held invalid for lack of invention in that it involved no more than mechanical skill.

*Invention; all elements of claim old; no new result.*—Where all the elements of a patent claim were old and had been used in various mechanical arts as well as in the art to which the patent relates, and they accomplish no more than the aggregate of the old results, their use, even for a new purpose, would not be invention.

*Validity of claims; anticipation.*—Where patent claims read upon preexisting structures in public use, they must be held invalid.

*The Reporter's* statement of the case:

*Mr. W. H. Swenarton* for the plaintiff.

*Mr. Alexander Holtzoff*, with whom was *Mr. Assistant Attorney General George C. Sweeney*, for the defendant.

An application for a patent by Carl G. Swebilius on June 11, 1918, was assigned to the Marlin Rockwell Corporation and by it assigned to plaintiff, The Marlin Firearms Corporation, on August 24, 1921. Louis H. Strouse and Eugene S. Bibb were appointed receivers of The Marlin Firearms Corporation July 13, 1923, and prosecute this case.

Plaintiff sues to recover compensation in the amount of $400,000, more or less, with interest from April 3, 1923, the date on which patent #1450653 was issued on the above-mentioned application, for alleged infringement and unauthorized use of the patented device on machine guns used on airplanes.

The patent involved in the case covers a slide in the firing mechanism of the Browning aircraft machine gun, the purpose of which slide was the transmission of impulses of the trigger motor of the C. C. synchronizing gears to a sliding sear, which, in turn, controlled the firing pin which primed the cartridge. Swebilius conceived the alleged invention during 1918, as will be disclosed in more detail by the findings, while he was engaged as an employee of the Marlin Rockwell Corporation, which was manufacturing aircraft guns for the United States, in adapting the synchronizing gears of the Vickers aircraft machine gun to the Browning ground machine gun so as to equip it for use on airplanes.

The questions now before the court relate to validity and infringement. The defendant interposes the defenses, first, that the patent is invalid in that it does not cover a patentable novelty; second, that if the device covered by the patent is in fact patentable, the United States is, under the circumstances, the equitable owner thereof; and third, that even if the Government is not the equitable owner, it has, on the facts, an implied license thereunder. The plaintiff denies these contentions and insists that the adaptation of the Browning machine gun for synchronized firing involved considerably more than the mere problem of transmitting motion from the trigger on the frame of the gun, having a path at right angle to the movement of the sear which released the firing pin, and that, therefore, the essence

of the Swebilius invention of the patent in suit was not such as to be evident to or within the knowledge of the mechanic skilled in the art; that the patentee, Swebilius, was the first to employ in a synchronizing mechanism for automatic guns a reciprocating member, or slide, mounted on the breech bolt for reciprocation relative to the sear, and means to operate said slide, all for the purpose of transmitting impulses from the trigger motor to the firing pin of an automatic machine gun in such manner as only to effect the firing of the gun by such impulses when the same was completely breeched, and that none of the patents relied upon by the defendant as anticipating the patent in suit disclosed any such combination of such elements or of any equivalent thereof.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. A machine gun is a small caliber firearm in which either the gas pressure or the recoil of the gun barrel is utilized through appropriate mechanism to unlock the breech, eject the empty cartridge case, extract a fresh cartridge from a belt and feed it to the chamber, close and lock the breech and release the firing pin. These various movements are automatically accomplished and continue to take place as long as the trigger or release mechanism is held in firing position. The rate of operation of this mechanism or the rate of firing is dependent upon the inertia and extent of movement of the various moving parts and in general is in the neighborhood of from 800 to 1,200 rounds per minute.

2. In adapting machine guns for use on airplanes it is essential that the gun fire forwardly through the rotational plane of the propeller. A basic problem therefore arises in the development of suitable mechanism such as will permit the timing or synchronization of the shots relative to the rotation of the propeller in such manner that they will take place when the blades are out of the line of fire and thus avoid damage. One of the factors involved in this problem is that the rate of the firing of the machine gun per minute and the revolutions of the propeller per minute are generally never the same nor multiples of each other, the rate

of revolutions of the propeller being generally faster than the rate of fire of a machine gun.

3. One solution of the problem of adapting machine guns to airplanes in such manner as to eliminate the danger of striking the propeller blades with the bullets was developed in England by Gogu Constantinesco. His solution consisted of a synchronizing gear mechanism which connected the airplane engine with the firing mechanism of the gun. The mechanism, which operated on the hydraulic principle, consisted of four main units: a generator unit operated by the engine and comprising a cam-operated piston; an oil line; a trigger motor, and a releasing mechanism unit. The generator unit transmitted pressure impulses through the oil line to the trigger motor and thence to the gun mechanism. The releasing mechanism unit was employed for the purpose of controlling or bypassing the pressure impulses and thus allowing the gunner to fire the gun at will and to stop firing when he so desired. The impulses transmitted to the trigger motor from the engine through the synchronizing gear were dependent upon the angular location of the operating cam relative to the propeller and the speed of the propeller. The gun was so designed that these impulses would not cause the release of the gear until the gun mechanism was in the position where the gun was breeched and ready for firing.

This apparatus was generally known as the Constantinesco synchronizing gears or C. C. synchronizing gears. Constantinesco applied for United States patent on his invention on September 4, 1917, and letters patent #1372944 was issued to him thereon on March 29, 1921.

A copy of this patent, defendant's exhibit 20, is by reference made a part of this finding.

4. Prior to August 1917, the British Government adapted a machine gun known as the Vickers for use on airplanes by connecting it to the engine with the Constantinesco or C. C. synchronizing gears and making certain necessary modifications in details of the firing mechanism of the machine gun.

The Vickers aircraft gun with the C. C. synchronizing gear was used for synchronized firing from airplanes by

the British, French, and the American Armies during the World War.

**5.** The Vickers machine gun referred to in finding 4 utilizes the energy of recoil to operate the mechanism of the gun. This energy operates to retract the breech bolt after the gun is fired. This movement of the breech bolt serves to eject the empty cartridge case and place a fresh cartridge in position for loading into the chamber. A recoil spring then functions to carry the barrel and breech mechanism forward into the firing position, sometimes referred to as the breeched or locked position.

When the breech bolt is in the firing position, pressure on the trigger of the gun retracts a longitudinal trigger bar located in the cover of the breech bolt, the rear end of which bar is in an engagement with the trigger. The forward end of the trigger bar is in engagement with the "sear", which is a lever or cam having the function of holding the firing pin in its retracted position. Retraction of the trigger bar thus rotates the sear and causes release of the firing pin, which is then thrown forward by the firing-pin spring and primes or fires the cartridge.

**6.** In the summer of 1917 the War Department of the United States was engaged in investigating problems involved in the firing of machine guns from airplanes. In August 1917 representatives sent to Europe by the War Department obtained two British Vickers aircraft machine guns equipped with the Constantinesco synchronizing gears.

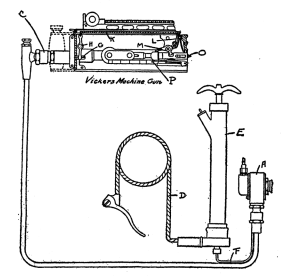
About the first of September 1917 one of these Vickers guns equipped with the Constantinesco gears was delivered by the War Department to the plant of the Marlin Rockwell Corporation at New Haven, Connecticut. At the same time the War Department delivered to the Marlin Rockwell Corporation complete information regarding the problems arising in connection with synchronized firing.

Army officers were detailed to the Marlin Rockwell plant to supervise work and furnish information to the Marlin Rockwell employees.

**7.** The Vickers aircraft gun with the Constantinesco synchronizing gear as furnished to the United States by the

British Government and as sent to the Marlin Rockwell plant is diagrammatically illustrated in the accompanying drawing:

*Constantinesco Hydraulic Synchronizer*
*(as in original sample furnished to United States by British Government)*




The mechanism comprises a generator unit A which functions by means of an engine-driven cam to generate suitably timed pressure impulses upon oil contained in a tubular conduit B connected to a trigger motor C; the oil system is kept under pressure by a hand pump E, and a suitable by-pass F is controlled by mechanism D in such manner that transmission of the impulses to the trigger motor and the consequent operation of the firing of the gun are under the control of the pilot or gunner. When the control mecha-

nism D is operated so as to permit the impulses to be transmitted from the generator to the trigger motor plunger G, this plunger moves forward on each impulse and rotates the lever H, which lever is connected at its top with trigger bar K. The trigger bar K is in engagement at its forward end with the sear L. When the trigger motor plunger G therefore moves forward under an impulse it operates the lever H and trigger bar K to rotate or reciprocate the sear L about its pivot, thus releasing the cocking lever M which in turn releases the firing pin O which moves forward and fires the cartridge.

When the breech bolt is in its firing or locked position the trigger bar K is in engagement with the sear L; consequently if the trigger motor C receives an impulse when the breech block is not in breeched position, the trigger bar K is retracted and merely idles and does not cause any action of the gun.

In addition the firing pin O is engaged by a safety sear P which serves to restrain it from moving forward until the breech bolt is in the breeched or firing position. Any impulse received by the trigger bar K prior to the breech bolt assuming the breeched position or firing position therefore does not cause the gun to operate, but any impulse received by the trigger motor C subsequently to the breech bolt assuming its firing position will cause the gun to fire.

The highest rate of fire of the Vickers synchronized aircraft machine gun was 850 to 900 shots per minute.

8. September 27, 1917, the Ordnance Department entered into a contract with the Marlin Rockwell Corporation for the manufacture of 23,000 Marlin aircraft machine guns, conditioned upon the Marlin machine gun being first made suitable for synchronized fire from aircraft in connection with the C. C. gear. March 21, 1918, the Ordnance Department made a contract with the Marlin Rockwell Corporation for the manufacture of an additional quantity of 15,000 Marlin aircraft machine guns. The so-called Marlin gun was developed at the plant of the Marlin Rockwell Corporation and was intended for temporary use until the Browning machine gun, which was then being developed by

John M. Browning, could be made ready for quantity production.

9. In February 1918 John M. Browning completed the development of a machine gun for ground use which became known as the Browning machine gun. This gun was developed at Hartford, Connecticut.

This gun, as originally constructed for ground use, had a rate of fire of 350 shots per minute. In order to make it suitable for aircraft use, Browning speeded up the rate of fire to 1,200 shots per minute by the addition of a muzzle attachment to increase the recoil energy of the barrel, lightening of the breech bolt, lessening of the firing pin fall, and increasing the strength of certain springs.

On or before March 1, 1918, sample guns of this type were delivered to the experimental shops of the Marlin Rockwell Corporation at Liberty Field, New Haven, Connecticut, for the purpose of adapting the Browning gun to synchronized fire from aircraft.

10. The Browning machine gun of the ground type was a recoil-operated gun. When the gun was fired the energy of the recoil caused the barrel, the barrel extension, and the bolt which were locked together to move to the rear. This rearward movement caused the feeding mechanism to feed a loaded cartridge into position after extracting the empty cartridge. While the breech bolt was moving to the rear the upper end of the cocking lever which was pivoted in the breech bolt engaged in the receiver of the gun in such manner as to cause the lower end of the cocking lever which engaged the firing pin to move the same into firing position where it was engaged and held by the sear.

The energy stored in the recoil spring then caused the breech bolt to move forward into the firing position. During this forward movement the firing pin was retained in its rear position by the sear and was capable of release only when the sear was operated by the trigger bar.

The trigger bar was pivoted to the receiver end; its rear end had a trigger shape while its front end had a 45-degree cam which engaged a similar shaped cam at the bottom of the sear. This engagement of the trigger bar and the sear took place only when the breech mechanism was in the

firing position. If at that time the trigger was operated, the sear mechanism was released which in turn released the firing pin which moved forward and fired the cartridge. The sear was of the vertical sliding type.

11. In order to adapt the Browning gun for synchronized aircraft fire, it was necessary to convert the gun from a full automatic gun to a "single shot" or a semi-automatic gun, i. e., instead of allowing the gun to continue firing as long as the trigger mechanism was depressed, it was desirable to operate the trigger mechanism for each shot. The feed way and the feeding mechanism had to be changed in order to make it suitable for a disintegrating steel cartridge belt, which is used on aircraft guns, instead of a woven fabric belt, which is used on ground guns; and it was necessary to make modifications in the firing mechanism to permit the attachment of synchronizing gears so as to transmit the action of the synchronized trigger motor to the sear of the gun.

12. The various alterations in the structure of the Browning machine gun necessary to adapt it for synchronized aircraft fire were the result of the work and collaboration of Lieutenant Wheeler, Captain Craft, Mr. Browning, Hugh Rockwell, and Carl Swebilius.

Lieutenant Wheeler was stationed at the experimental laboratory of the Marlin Rockwell Corporation at Liberty Field, New Haven, Connecticut, during February, March, and April of 1918. His work in connection with the Browning gun was supervisory in character but in addition he performed a considerable amount of the actual work himself and made the firing tests.

Lieutenant Wheeler's superior officer was Captain Craft, who during this period visited the laboratory every two or three weeks, staying a week or longer at each visit.

Hugh Rockwell was an officer of the Marlin Rockwell Corporation.

Carl G. Swebilius was, during the time of the war, employed by the Marlin Rockwell Corporation to make up experimental models. He was stationed at the plant of the Marlin Rockwell Corporation, of New Haven, receiving instructions from the experimental shop at Liberty Field.

His contract of employment with the Marlin Rockwell Corporation required him to assign to it patents covering any improvements or inventions devised by him while in its employment.

Swebilius saw the Vickers aircraft machine gun with the Constantinesco synchronizing gear attached thereto when it was first delivered at the plant of the Marlin Rockwell Corporation. He examined the gun in detail and its operation was explained to him by ordnance officers stationed at the plant.

13. There is no satisfactory evidence as to what individual contributions were made by the various persons mentioned in finding 12 relative to the changes in structure necessary for adaptation of the Browning machine gun to synchronized aircraft fire. Lieutenant Wheeler, who had charge of the matter in a supervisory capacity, lost his life during the war, and Captain Craft, the only member of the group who testified, was not present at all of the various conferences which took place between the members of the group and did not know who suggested making the connection of the synchronizing gear to the gun from the side.

Insofar as the patent in suit is concerned Swebilius had the assistance of numerous United States Army officers in the development of the device covered by the patent, together with material, blueprints, designs, and experimental data of the Ordnance Department, all of which was placed at his disposal.

There is no satisfactory evidence that the assistance and collaboration which Swebilius received from his associates differed in degree or character from that which would be given by the ordinary mechanic skilled in this art.

14. In adapting the Browning machine gun to synchronized fire for aircraft, the hydraulic trigger motor of the Constantinesco synchronizing gear was mounted on the rear of a housing, which housing was arranged for attachment to the side of the receiver of the Browning gun. At the front end of the housing a triangular trigger member was mounted having one portion adapted to function as a cam against which the trigger motor bears, and having a second

member pivoted on the trigger and projecting through a slot cut in the side of the receiver.

A transverse slide member was incorporated into the breechbolt structure in such manner that when the breechbolt was closed and in firing position, one end of the slide was in operative relationship to the trigger element which projected through the slot in the receiver in such manner that when the trigger-motor plunger engaged the triangular trigger member the slide was moved across the face of the bolt provided the breechbolt was in a locked position.

The movement of the slide was at right angle to the sear, which it engaged by means of coacting 45-degree cam surfaces.

With each impulse transmitted through the oil line of the synchronizing gear the trigger motor actuated the triangular trigger and caused the transverse slide on the breech bolt to coact through the 45-degree cam surfaces with the vertical sliding sear so as to release the firing pin, provided the breechbolt was in locked position. If the impulse was delivered at any other time than when the breechbolt was not in a forward or firing position, the trigger member which projected through the slot in the receiver would not engage the transverse slide member and the movement of the trigger element was, therefore, simply an idling movement.

**15.** Subsequently to March 1918 a series of contracts were given by the War Department to the Marlin Rockwell Corporation for the manufacture of 30,000 Browning aircraft machine guns adapted for use with the Constantinesco synchronizing gears.

**16.** Pursuant to a supplementary contract dated April 23, 1918, the Government advanced to the Marlin Rockwell Corporation the sum of $1,160,000 as a payment on account of the cost of the Marlin aircraft machine guns which the company had contracted to manufacture for the United States. On May 24, 1918, the Government entered into a contract with the Marlin Rockwell Corporation by which the Government agreed to purchase from the Marlin Rockwell Corporation, and thereafter did purchase from it, for the sum of $1,000,000, certain machines, tools, jigs, and

dies which the Marlin Rockwell Corporation had been using in the manufacture of the Browning aircraft machine guns and many of which could be used for no other purpose than the manufacture of Browning aircraft machine guns, with or without the invention covered by the patent in suit. After the termination of the contracts for the manufacture of Browning guns, the aforesaid machines, tools, jigs, and dies were delivered by the Marlin Rockwell Corporation to the Government and placed in the Springfield Armory at Springfield, Massachusetts.

**17.** An application for a patent, serial number 516901, was filed in the United States Patent Office on June 11, 1918, in behalf of Carl G. Swebilius, the same being assigned to the Marlin Rockwell Corporation. The description and the drawings disclosed the breech bolt of an aircraft machine gun and the trigger motor of the Constantinesco synchronizing gear, the impulses of the trigger motor being transmitted to the sear by means of a transverse slide inserted through a slot in the breech bolt. The application contained sixteen claims. The aforesaid slide was included as an element in all of the claims except claims 9, 12, 13, 14, and 15 which related to the structure of the trigger motor proper and means of attaching it to the gun.

The Patent Office required a division and thereupon the applicant canceled claims 12 and 13 and added certain new claims. All of the new claims also included the slide as an element of the combination, except claims 18, 19, 22, and 25 which referred to the structure of the trigger mechanism proper. The examiner then rejected certain claims on prior art. Thereupon the applicant canceled claims 1, 2, and 3 and substituted three other claims in their stead, all of which included as elements a sear slidably mounted on the breechblock, and a slide mounted on the breechblock for reciprocation relative to said sear. The applicant argued that his claims were allowable over the references of record, since the claims recited the fact that the sear and sear slide were both mounted on the breechbolt, whereas in the references the sear alone was slidably mounted on the breechbolt, while the means intermediate the trigger and the sear

were carried by the framework of the gun. On August 18, 1920, the application was allowed by the Patent Office.

The applicant failed to pay the final fee within the time prescribed by law and the application lapsed.

**18.** The plaintiff, the Marlin Firearms Corporation, was incorporated under the laws of the State of Delaware in 1921.

The Swebilius application was assigned by the Marlin Rockwell Corporation to the Marlin Firearms Corporation on or about August 24, 1921.

On or about July 13, 1923, Louis H. Strouse and Eugene S. Bibb were appointed as receivers of the business, property, and assets of the Marlin Firearms Corporation.

**19.** November 23, 1921, the Marlin Firearms Corporation filed a petition showing that it was the assignee of the applicant's rights and renewing the Swebilius application. Thereafter the Marlin Firearms Corporation filed an amendment adding several new claims which read broadly on a combination, in an automatic gun, of a receiver, a breech bolt reciprocatively mounted therein, a movable sear carried thereby, a housing mounted on a wall of said receiver and means in said housing operatively connected with said sear for moving it in one direction, the slide not being expressly included as an element of the claim.

A number of the claims were then rejected on prior art, among the references being the British patent to Maxim, #14047 of 1885. The examiner pointed out that some of the rejected claims recited a sliding sear, while Maxim showed a pivoted sear. The examiner added: "It is held, however, that no invention would be involved in substituting a sliding sear in Maxim, especially so, in view of the known use of sliding sears on breech blocks." The applicant again added new claims, all of which included the slide as an element, and requested a reconsideration of the rejection of the other claims, asserting that "to introduce a sliding sear into Maxim in place of the pivoted sear certainly involves the exercise of the invention faculty even in view of the sliding sears in the other patents." On reconsideration the examiner again repeated his rejection of certain claims and allowed others. The applicant canceled several claims and

requested a reconsideration of others, whereupon the application was allowed. On April 3, 1923, patent #1450653 was issued on said application. This is the patent in suit.

A copy of the file-wrapper and contents relating to the patent in suit, defendant's exhibit 7, is by reference made a part of this finding.

**20.** The patent in suit to Swebilius, #1450653, relates to the synchronization of machine guns with respect to propellers of airplanes.

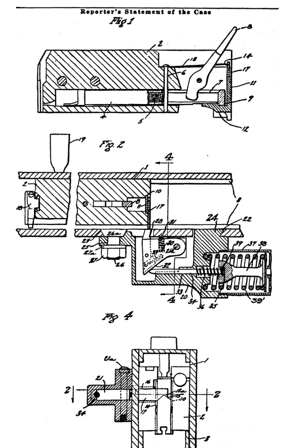
As disclosed in the inserted drawings, figs. 1, 2, and 4, a machine gun receiver has a breech bolt mechanism in which a breech bolt is mounted for sliding reciprocating movement, the bolt being bored longitudinally to receive the firing pin 4, fig. 2, which is normally urged forward by a spring 5 housed within the firing pin.

As shown in fig. 1, a sear 11 is mounted to slide vertically in grooves formed on the rear face of the breech bolt. The lower end of this sear is so shaped as to engage a shoulder or projection 9 on the underside of the firing pin at its rear end in such manner as to hold the same in its retracted position. A cocking lever 8 is mounted on the breech bolt and extends upwardly therefrom.

The upper portion of sear 11 is formed with upwardly faced cam surfaces 15, fig. 4, and a slide member 17, figs. 2 and 4, transversely inserted through a slot in the rear surfaces of the bolts, is adapted for a directional movement at right angle to the movement of sear 11. The cam surfaces 15, fig. 4, of sear 11 are engaged by complemental cam surfaces, 17a, fig. 4, formed on the slide 17 so that when the slide 17 moves transversely the sear 11, fig. 1, would be depressed, thereby releasing the firing pin 4.

A trigger motor is mounted on one side of the receiver plates and cooperates with a triangularly formed trigger member 32, fig. 2, mounted on a pin 21a, fig. 2, in the trigger motor housing. A lug or member 28, fig. 2, is pivoted in the forward end of the triangularly formed trigger member 32, the inner end of which lug projects through a slot in the side plate of the receiver. When the breech bolt is in its breeched or locked position, this lug is in line with the sear slide 17 and will act to contact the

Reporter's Statement of the Case



same and force it inwardly when the trigger is operated by means of suitable impulses transmitted to it from the oil line. If, however, the trigger member 32 is operated when the breech bolt is not in its approximate forward or firing position to such an extent that the inward projecting lug 28, fig. 2, and the transverse sear slide 17 will not be in operative relationship with each other, the motion of the trigger will be an idling motion and will not result in the gun being fired.

A copy of the patent in suit, defendant's exhibit E, is by reference made a part of this finding.

**21.** The claims in suit in Swebilius patent #1450653 are as follows:

> 1. In an automatic gun, a breechblock, a sear slidably mounted on said breechblock, a slide mounted on said breechblock for reciprocation relative to said sear, interengaging cam surfaces on said sear and slide, and a trigger adapted to engage said slide.
>
> 2. In an automatic gun, a breechblock, a sear slidably mounted on said breechblock, a slide mounted on said breechblock for reciprocation relative to said sear, one of said reciprocatory members having a tapered head and the other having a tapered socket, and a trigger adapted to engage said slide.
>
> 3. In an automatic gun, a breechblock, a sear slidably mounted on said breechblock, a slide mounted on said breechblock for reciprocation relative to said sear, means to operate said sear upon reciprocation of said slide, and means to operate said slide.
>
> 4. In an automatic gun, a breechblock, a vertically-sliding sear mounted on said breechblock, a slide mounted on said breechblock for horizontal reciprocation, means to operate said sear upon reciprocation of said slide, and means to operate said slide.
>
> 5. In an automatic gun, a reciprocating breechblock, a reciprocating sear carried by said breechblock, a trigger, and means on said breechblock intermediate said trigger and sear to move the sear when the trigger is operated.
>
> 6. In an automatic gun, a breechblock, a sear and a slide mounted on said breechblock for relative reciprocation and a cam surface on one of reciprocating members engaging a coacting cam surface on the other.
>
> 7. In an automatic gun, a breechblock, a sear and a slide mounted on said breechblock for relative recipro-

cation, one of the aforesaid members having a convex surface engaging with a concave surface in the other of the aforesaid members.

8. In an automatic gun, a breechblock, a sear and a slide mounted on said breechblock for relative reciprocation, and means to reciprocate the sear upon reciprocation of the said slide.

9. In an automatic gun, a breechblock, a sliding sear and a reciprocating sear operating member both mounted upon said breechblock, and interengaging oblique surfaces upon said elements.

11. In an automatic gun, an oscillatory trigger, a reciprocating breechblock, a sear slidably mounted on said breechblock, a slide on said breechblock for operating said sear, and means to allow continuous oscillation of the trigger without operating the slide until after the gun is completely breeched.

12. In an automatic gun, a reciprocating breechbolt, a firing pin operatively associated therewith, a sear reciprocatively mounted on said breechbolt and adapted to hold said firing pin in inoperative position and a slide mounted on said breechbolt and coacting with said sear whereby movement of the former causes the latter to release said firing pin and means to operate said slide.

13. In an automatic gun, a reciprocating breechbolt a firing pin operatively associated therewith, a sliding sear mounted on said breechbolt and adapted to hold said firing pin in inoperative position, a sear slide mounted on said breechbolt, coacting oblique surfaces on said sear slide and sear whereby movement of the former causes the latter to release said firing pin and means to operate said sear slide.

14. In an automatic gun, a reciprocating breech bolt, a firing pin operatively associated therewith, a sear mounted on said breech bolt and adapted to hold said firing pin in inoperative position, a sear slide mounted on said breech bolt, one of said two last-named members having a convex surface adapted for engagement with a concave surface in the other member whereby movement of the sear slide causes the sear to release said firing pin, and means to operate said sear slide.

15. In an automatic gun, a reciprocating breech bolt, a firing pin operatively associated therewith, a sear reciprocatively mounted on said breech bolt and adapted to hold said firing pin in inoperative position, a slide mounted on said breech bolt and coacting with said sear whereby movement of the former causes the latter to

release said firing pin, and a trigger to operate said slide.

22. In an automatic gun, a receiver, a breech bolt reciprocatively mounted therein, a movable sear carried thereby, a housing mounted on a wall of said receiver, and means in said housing operatively connected with said sear for moving it in one direction.

23. In an automatic gun, a receiver, a breech bolt reciprocatively mounted therein, a sear slidably mounted in said breech bolt, a housing carried by a wall of the receiver, and means in said housing operatively connected with said sear for sliding it in one direction.

24. In an automatic gun, a receiver, a breech bolt reciprocatively mounted therein, a sear slidably mounted on said breech bolt, a housing carried by a wall of said receiver, and means in said housing and operatively associated with said sear for transmitting impulses from a distance to said sear to cause the operation thereof in one direction.

25. In an automatic gun, a receiver, a breech bolt reciprocatively mounted therein, a sear slidably mounted on said breech bolt, a housing carried by a wall of said receiver, and means in said housing cooperating with said sear to cause the movement thereof in one direction.

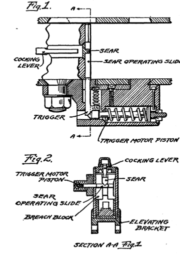
26. In an automatic gun, a breech bolt, a firing pin carried by said breech bolt, a sear reciprocatively mounted on said breech bolt and adapted to engage said firing pin, a sear operating member reciprocatively mounted on said breech bolt, and a surface on one of said two last-named members oblique to its path of reciprocation whereby reciprocation of said sear operating member moves the sear out of engagement with said firing pin.

27. In an automatic gun, a breech bolt, a sear slidably mounted on said breech bolt, a sear operating member reciprocatively mounted on said breech bolt, and a surface on one of said two last-named members oblique to the path of movement of one of said members and adapted to contact with the other of said members whereby movement of said sear operating member operates said sear.

28. In an automatic gun, a receiver, a breech bolt reciprocatively mounted therein, a sear mounted on said breech bolt for vertical reciprocation, a sear operating member mounted on said breech bolt for horizontal reciprocation, a housing carried by one wall of said receiver, a trigger mounted in said housing, said trigger being adapted to engage said sear operating

member through a slot in said wall, and coacting means on said sear and sear operating member whereby reciprocation of the latter causes reciprocation of the former.

22. Subsequent to the issuance of the patent in suit and prior to the filing of the petition in this case, there had been manufactured for or by the United States without the




consent of plaintiff aircraft machine guns containing the firing mechanism of the structure shown in the inserted drawings, figs. 1 and 2, entitled "Browning Trigger Motor, Government Structure."

This firing mechanism includes a slidable breech block operated in a receiver of a machine gun with a vertical sear mounted for vertical sliding reciprocation at the rear thereof. A transverse slide member is also mounted on the breech

block which member is adapted for reciprocation at right angles to the movement of the sear. Movement of the transverse slide member causes the sear to operate by virtue of cooperating cam surfaces on the sliding member and sear.

A trigger motor is mounted upon one of the receiver side plates, the same being adapted to operate a trigger member including a lug which projects inwardly through a slot in the receiver plate and which functions when actuated by the trigger to engage the end of the transverse sliding member and through it actuating the sear when the breech block is in a closed or firing position.

The terminology of all of the claims in suit is found to apply to this structure.

**23.** The Vickers aircraft machine gun with the Constantinesco synchronizing gears attached thereto, which was delivered to the plant of the Marlin Rockwell Corporation in September 1917 and which was inspected and examined by Swebilius before the date of his alleged invention, comprised a receiver, a breech bolt reciprocatively mounted therein, a movable sear carried thereby (which sear was adapted for reciprocative motion about a pivot), a housing mounted on the rear walls of said receiver, and means in said housing operatively connected with said sear for moving it in one direction.

The Browning machine gun delivered to the Marlin Rockwell plant for adaptation for synchronized fire was equipped at the time of delivery with a sear slidably mounted in its breechbolt, and Swebilius was familiar with this construction prior to the date of his alleged invention.

**24.** Prior to June 11, 1918, the filing date of the Swebilius application which matured into the patent in suit, there were in the art to which the said patent relates, the following patents:

British patent to Maxim, #14047 of 1885; printed in 1886.

British patent to Enever, #5940 of 1915; received in the United States Patent Office June 7, 1916, and sealed on the sixteenth day of August, 1916.

United States patent to Kjellman et al., #690739, patented January 7, 1902.

United States patent to Kjellman, #814547, patented March 6, 1906.

United States patent to Whiting, #1143470, patented June 15, 1915.

British patent to Mannlicher, #6787 of 1892.

United States patent to Schneider, #788432, patented April 25, 1905.

United States patent to Gerdom, #751847, patented February 9, 1904.

Copies of the above patents, defendant's exhibits numbers 8, 9, 10, 11, 12, 13, 14, and 15, are by reference made a part of this finding.

25. The British patent to Maxim, #14047 of 1885, relates to machine guns; figures 19 and 29 of the patent disclose details of the firing mechanism. The structure as disclosed in these figures of the drawings and in the specification comprises a reciprocating breechbolt having a sear and a slide member both mounted thereon; the sear is mounted so as to have a reciprocatory motion about a pivot, the sear having the usual function of engaging a firing pin for the purpose of controlling its release. This firing pin is also contained in the breechbolt.

The slide member is mounted in a vertical position and its upper end engages the rear end of the sear. The lower end of the slide member has a cammed surface which is adapted to assume a position for contact with a trigger member when the breech bolt is in the forward or breeched position. The trigger member is adapted for operation by the trigger, a hand-operated trigger being shown.

Pressure on the trigger causes rotation of the trigger bar which in turn operates through the cam surface of the slide member to force the slide upward, provided at that time the breechbolt is in the forward position. The upward motion of the slide member operates the sear, causing the same to reciprocate about its pivot and release the firing pin. A second or safety sear is provided which functions to hold the firing pin in the retracted position independently of the release by the main sear until the breechbolt reaches its forward or breeched position.

26. The Maxim structure is capable of being successfully synchronized for firing from aircraft by the substitution of a trigger motor of a synchronizing gear for the hand trigger so that the trigger motor plunger would either act on the trigger bar or come into direct contact with the slide member. A number of machine guns embodying the structure as shown in the Maxim patent were built and used by the German Army during the World War for synchronized firing from aircraft; at least one of these guns is now in the museum of the Ordnance Department of the United States Army at Washington, D. C.

27. If the Maxim structure is thus synchronized and the trigger member receives an impulse when the breechbolt is not in a forward position the cam surface on the slide member will not be in registration with the corresponding cam surface on the trigger member and the latter will, therefore, merely idle, and the gun will not fire.

Should the trigger member receive an impulse at an interval in the operation of the parts when the cam surfaces of the trigger member and the slide member are in partial but not complete registration, the slide member will be lifted as the breechbolt moves forward but the gun will not fire until the safety gear is released by the breech bolt assuming its full forward position. Such action will cause a slight variation or lag in the time of firing.

This variation while varying the width of the shot group, is within the factor of safety. The arc of the shot group taking the variation into consideration with the propeller running at a blade speed of 1,800 r. p. m., is 16.5 degrees with the structure of the Maxim patent operated with a synchronizing trigger motor of the same type as that of the patent in suit, as compared with an arc of 15.75 degrees in the shot group with the structure of the patent in suit at the same propeller speed.

28. British patent to Enever, #5940 of 1915, discloses an automatic hand-operated firearm of the magazine type. The firing mechanism as disclosed provides a sliding reciprocating breechbolt mechanism having a vertical sliding sear. When the breechbolt is moved into the forward or breeched

position the end of the sear is carried into operative relationship with a plunger connected with the trigger, this plunger member being carried on the housing or receiver of the gun.

When the trigger is pulled the plunger member will operate through the sear to release the firing pin provided the end of the sear is in operative relationship with the plunger which relationship only occurs when the breech bolt is in a substantially breeched position.

**29.** United States patent to Kjellman et al., #690739 of 1902, discloses an automatic hand-operated firearm of the magazine type having a reciprocating breech bolt carrying a firing pin and firing pin spring. A vertical sliding sear is also mounted in the breech bolt with its upper end arranged to engage with the firing pin when the latter is in a cocked position. The sear is normally held in an elevated position by means of a spring and has as its lower end a hook-shaped portion adapted to engage with a sliding member carried or mounted on the frame of the gun. This slide is engaged by one end of the trigger.

Upon operation of the trigger, if at that instance the breech bolt is in its forward or firing position, the slide engages the sear and thus operates the firing pin.

**30.** One character of problem solved by prior art structures as exemplified by the Vickers machine gun as synchronized by the Constantinesco gear, the Browning machine gun structure as supplied to the Marlin Rockwell Corporation for synchronization, the Maxim machine gun in British patent to Maxim #14047 of 1885, British patent to Enever, #5940 of 1915, and United States patent to Kjellman et al., #690739, was that of imparting a trigger impulse from a trigger member carried on the frame of a machine gun to a sear carried on a breech block having a reciprocating motion relative to the frame.

This same problem when considered in connection with the adaptation of the Browning gun for synchronized fire at the plant of the Marlin Rockwell Corporation, differed from the above enumerated prior structures and patents only in that it involved the additional problem of transmitting

motion from a trigger member on the frame having a path of movement at right angles to the movement of the sear.

The use of inclined cam surfaces for transmitting motion in one direction to motion in a direction at an angle thereto was used quite extensively in various mechanical arts as well as the gun-making art, and was within the knowledge of a mechanic skilled in the art at the time of application for a patent in suit. This is exemplified by the following prior patents:

United States patent to Heyse, #141714, patented August 12, 1873.

United States patent to Brown, #179155, patented June 27, 1876.

United States patent to Hartness, #425224, patented April 8, 1890.

United States patent to Nordenfelt, #298493, patented May 13, 1884.

Copies of the above patents, defendant's exhibits numbers 16, 17, 18, and 19, are by reference made a part of this finding.

**31.** The Government paid the Marlin Rockwell Corporation the sum of $2,000 each for the first three Browning aircraft machine guns manufactured by it. The price paid to the Marlin Rockwell Corporation by the Government for the remainder of the Browning aircraft machine guns was $242 apiece. At the time of the final settlement between the Marlin Rockwell Corporation and the United States, which took place in 1919, the United States reimbursed the Marlin Rockwell Corporation for the wages of its various employees, including Swebilius, the patentee herein, for services performed for their employer during the year 1918.

**32.** The maximum daily capacity of the plant of the Marlin Rockwell Corporation for the manufacture of Browning aircraft machine guns was 300 guns. As was well known to the company, the Government requirements were far in excess of that quantity, and it was, therefore, necessary to develop additional sources of supply of Browning aircraft machine guns. For that purpose the Marlin Rockwell Corporation at the request of the Government, in June 1918 and at various times thereafter, sent full and detailed speci-

fications, drawings, and working models of the Browning aircraft machine gun to several other manufacturers, among whom were the Remington Arms Company, the New England Westinghouse Company, and the Colt Patent Firearms Corporation. As was then well known to the Marlin Rockwell Corporation, it was the purpose of the Government to have these companies manufacture Browning aircraft machine guns. Beginning in or about June 1918, the Government, with the full knowledge of the Marlin Rockwell Corporation, ordered Browning aircraft machine guns from the aforesaid companies, and without any protest from it or anyone else. Neither the Marlin Rockwell Corporation nor anyone else informed or notified either the Government or any of the aforesaid companies that an application for a patent on any part of the said gun had been filed in behalf of the Marlin Rockwell Corporation or that it was intended to file any such application. The Government, other than the United States Patent Office, received no information of the filing of the application for a patent until after the patent was issued April 3, 1923. No objection was ever made or any question raised as to the use by the Government of the device covered by the patent in suit, either by Swebilius, the patentee herein, or the Marlin Rockwell Corporation, or any of its officers or directors.

**33.** No notice of infringement was ever served on the defendant prior to the commencement of this action.

Neither the Marlin Firearms Corporation nor the receivers herein have ever manufactured any guns covered by the patent in suit.

Neither Swebilius, the patentee, nor the Marlin Rockwell Corporation, nor its successor, The Marlin Firearms Corporation, ever made any claim against the United States in connection with the patent in suit prior to the filing of the present action, and the Government was not informed of any intention on the part of the foregoing to make any claim.

The following United States Letters Patent have been withdrawn from this action and the plaintiff expressly waives any claim to compensation in regard to each and all

of said letters patent, numbers 1444890, 1496324, and 1422238.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Upon the facts established by the record, which have been set forth in detail in the findings and need not be repeated here, we are of opinion that the patent is invalid for lack of invention in that it involved no more than mechanical skill.

Plaintiff devotes considerable discussion to the proposition that the synchronization of machine guns for aircraft firing was a difficult and delicate problem, the solution of which was a commendable accomplishment. This problem, however, had been successfully mastered by Constantinesco in the development of his synchronizing gears, which had been successfully adapted to and used on the Vickers machine gun used by the British, French, and American armies during the war long prior to the date of the patent in suit. Swebilius was well acquainted with that apparatus and the manner in which it operated in conjunction with the Vickers machine gun. All that remained to be done when Swebilius, in collaboration with others as set forth in finding 12, first gave attention to the matter was to adapt the gears to the Browning machine gun. The Browning was an automatic machine gun and was equipped with all the elements or parts required in an aircraft machine gun except the means of transmitting the impulses of the trigger motor of the C. C. synchronizing gears to the sear that held the firing pin in a retracted position so as to depress the sear, thereby releasing the firing pin. This was accomplished by the placing of the sear slide 17, as shown in figs. 1, 2, and 4 of the patent, finding 20, in the firing mechanism of the Browning aircraft machine gun, the synchronizing gears of which were placed on the side of the Browning gun instead of at the rear as had been done in the case of the Vickers aircraft machine gun. The function of this slide and its relation to other members of the gears and breech

bolt are explained in detail in the findings, particularly findings 14 and 20, and need not be repeated here. The purpose of the slide 17, figs. 2 and 4, was to transmit impulses from the synchronizing gears to the sear 11, as shown in fig. 1, which, in turn, controlled the firing pin which primed or fired the cartridge. The synchronizing gears so controlled the time of firing that the bullet from the gun would always pass between the blades of the airplane propeller.

The use of the slides, or bars, in machine guns for the purpose of transmitting impulses from the trigger mechanism to the sear which controlled the firing pin was well known long prior to the date of the Swebilius patent. Such a feature was an element in all machine guns as shown by prior patents in the art, some of which used a pivoted sear and others a slide. The British patent, #14047, to Maxim discloses the details of the firing mechanism of a machine gun. It shows a reciprocating breech bolt, such as is shown by the patent in suit, having a pivoted sear and a slide, both mounted on the breech bolt. One end of the slide has a cammed surface (finding 25). The structure shown in the Maxim patent is capable of being successfully synchronized for aircraft use by the substitution of the trigger motor of a synchronizing gear in place of a hand trigger. A number of machine guns embodying the structure shown in the Maxim patent were built and used by the Imperial German Government for synchronized firing from aircraft (finding 26).

The British patent, 5940, to Enever in 1915 shows a firing mechanism with a reciprocating breech bolt having a vertical sliding sear (finding 27).

United States patent 690739, issued to Kjellman in 1902, likewise disclosed a firing mechanism comprising a vertical sliding sear (finding 29); likewise U. S. patent 788432 to Schneider in 1905 and U. S. patent 1143470 to Whiting in 1915 each disclosed a sliding sear to act upon the sear that controlled the firing pin.

An examination of the prior art shows that in a number of earlier structures both the sear and the slide were mounted on the breech bolt, while in others one of these elements was

mounted on the breech bolt, and the other was mounted on the frame of the gun. Likewise some of the earlier sears were pivoted structures, while others were sliding or reciprocating structures; in all respects the equivalent at least of the slide involved in the patent in suit. All of these alternative constructions formed a part of the prior art, and we think there was no novelty in selecting any one of them in preference to the other.

Inclined cam surfaces, such as are disclosed by 15 and 17a of fig. 4 of the patent in suit, finding 20, for transmitting motion in one direction to motion in a direction at an angle thereto, were used extensively in various mechanical arts as well as in the gun-making art prior to the date of the patent in suit. This expedient was within the knowledge of a mechanic skilled in the art at the time of the application for the patent in suit (finding 30).

From what has been said above, we think the device, which the patent in suit purports to cover, is not a patentable novelty and that this conclusion is clearly sustained by the authorities. In *Mills* v. *United States*, 75 C. Cls. 256, 276, this court said:

> Invention results from the use of the creative mental faculty and must involve original thought or discovery, in contradistinction to the mechanical skill of the mechanic or artisan in selecting, combining, or rearranging the ideas of others into a more useful form.

In *Curtiss, et al.*, v. *United States*, 75 C. Cls. 286, 321, this court said:

> The difference between invention and the exercise of mechanical skill is not always easily discernible. Invention concededly involves the creative faculty, an exercise of the mental processes to evolve some original thought or discovery. Mechanical skill, at least as to one manifestation, consists in part at least of taking from the art elements that are old, whose inherent qualities are well known and by a suggestive combination, itself familiar, rearrange and relocate them so as to produce a more useful form.

See, also, *Newcomb, David Co., Inc.*, v. *R. C. Mahon Co.*, 59 Fed. (2d) 899, 901, in which the court stated that—

> * * * the inventor must have done more than make a judicious selection from the devices of the prior art * * *. This is but the exercise of the mechanical ability reasonably to be expected in the development of the art, * * *.

Swebilius, the patentee, did not testify in the case and the only information we have concerning his work in adapting the C. C. synchronizing gears to the Browning machine gun, as a result of which the application of the patent in suit was filed, is that, insofar as the patent in suit is concerned, he had the assistance of numerous U. S. Army officers in the development of the device covered by the patent, together with material, blue prints, designs, and experimental data of the Ordnance Department of the U. S. Army, all of which was placed at his disposal.

What has been said above applies to all of the claims of the patent in suit, but a word might be said with reference to the broad claims 22 to 28, inclusive, covering a basic combination of a machine gun with synchronizing gears. The original claims of the patent application were first rejected by the patent examiner on prior art. The applicant then sought to distinguish the references of the examiner (which references did not include the British patent to Maxim), by pointing out that in his structure both the sear which controlled the release of the firing pin and the slide that actuated the sear, causing the release of the firing pin, were mounted on the breech bolt, while in the art cited by the examiner the sear alone was mounted on the breech bolt and the slide was carried on the framework of the gun. Upon that basis the application was allowed August 18, 1920 (finding 17); but, when these claims were under consideration, the patent examiner apparently did not know and was not informed that the Browning machine gun for use on the ground and operated by a hand trigger, theretofore delivered to the Marlin Rockwell plant for adaptation to aircraft use and theretofore studied by Swebilius before he conceived his alleged invention and filed his application, had in fact both a slide and a sear mounted on the breech bolt. After the application was allowed in 1920 the applicant failed to pay the final fee within the prescribed time

and the application lapsed. More than a year later The Marlin Firearms Corporation, the plaintiff herein, filed a petition as assignee of the patent to renew the original application; thereupon the examiner cited the British patent to Maxim to which no reference had been previously made and which carried both the sear and the slide on the breech bolt.

Plaintiff sought to distinguish the Maxim patent on the ground that the latter used a pivoted sear while the patent application disclosed a sliding sear. In addition to the claims of the application as originally allowed, plaintiff, by amendment, added several new broad combination claims, nos. 22 to 28, inclusive. Thereafter the claims disclosed in the patent in suit were allowed and the patent in question issued April 3, 1923. During this consideration the patent examiner, obviously, it would seem, did not know and was not informed that the Browning machine gun of the ground type had a sliding sear and a slide both mounted on the breech bolt; to that extent, the very elements which the applicant claimed justified the allowance of the patent were found in a structure that had been in public use, and which had been delivered by the Government to the Marlin Rockwell Corporation, the plaintiff's predecessor, for modification to adapt it to synchronized firing.

The elements of the broad combination claims 22 to 28, inclusive, were either found in the Maxim patent which was successfully synchronized for aircraft firing by the substitution of the trigger motor of a synchronizing gear in place of a hand trigger, and also in the Vickers aircraft machine gun, or in the various mechanical and the gun-making arts (findings 6, 7, and 30). The Vickers machine gun was delivered to and studied by Swebilius prior to the date of his alleged invention.

This conclusion may be illustrated by an analysis of claim 22, which is typical of the combination claims. The first element mentioned is an automatic gun, that was old; the second is "a receiver", which was old; the third, "a breech bolt reciprocatively mounted therein", which also was old; the fourth, "a movable sear carried thereby" was likewise

old; fifth, "a housing mounted on a wall of said receiver" was well known; and the final element, "means in said housing operatively connected with said sear for moving it in one direction" was but the use of the old and well-known elements consisting of a slide, a pivoted sear, or cammed surfaces, for transmitting motion in one direction to motion in a direction at an angle thereto (finding 30).

As all of the elements of these claims were old and had been used in various mechanical arts, as well as in the gun-making art, they accomplished no more than the aggregate of the old results and their use, even for a new purpose, would not be invention. *Powers-Kennedy Contracting Corp., et al.,* v. *Concrete Mixing and Conveying Co.,* 282 U. S. 175, 186; *Mills* v. *United States, supra;* and *Curtiss, et al.,* v. *United States, supra.* Moreover as these claims read upon the Vickers gun, findings 6 and 23, and the Maxim gun, finding 25, which were preexisting structures in public use, they must be held invalid. As was said by the court in *Office Specialty Mfg. Co.* v. *Fenton Metallic Mfg. Co.,* 174 U. S. 492, 498:

> Putting the * * * patent in its most favorable light, it is very little, if anything, more than an aggregation of prior well-known devices, each constituent of which aggregation performs its own appropriate function in the old way. Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in *Hailes* v. *Van Wormer,* 20 Wall. 353, 368; *Reckendorfer* v. *Faber,* 92 U. S. 347, 356; *Phillips* v. *Detroit,* 111 U. S. 604; *Brinkerhoff* v. *Aloe,* 146 U. S. 515, 517; *Palmer* v. *Corning,* 156 U. S. 342, 345; *Richards* v. *Chase Elevator Co.* 158 U. S. 299.

See, also, *Grinnell Washing Machine Co.* v. *Johnson Co.,* 247 U. S. 426, 433, in which the court said:

> Applying the rule thus authoritatively settled by this court, we think no invention is shown in assembling these old elements for the purposes declared. No new function is "evolved from this combination"; the new

result, so far as one is achieved, is only that which arises from the well-known operation of each one of the elements.

Likewise the reasoning of the court in *Railroad Supply Co.* v. *Elyria Iron & Steel Co.*, 244 U. S. 285, 292, 293, is applicable here. The court said:

> With these facts before him the most that can be said for the patents in suit is that they gave a somewhat different form to three features which were perfectly familiar and were similarly grouped in prior forms of tie-plates but without giving to any of them any new function and without accomplishing by them any new result. This brings the patents within the principle so often declared that "a mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent." *Roberts* v. *Ryer*, 91 U. S. 150; *Belding Mfg. Co.* v. *Challenge Corn Planter Co.*, 152 U. S. 100; *Market Street Cable Ry. Co.* v. *Rowley*, 155 U. S. 621, 629. * * *
>
> Clearly persuaded as we are that the slight variations claimed for the patents in suit from the plates which had gone before do not constitute patentable invention, we cannot consent to further extend this discussion by a minute comparison of them with earlier patents appearing in the record, but we content ourselves with adopting as comment not to be improved upon in such a case as we have here the following from a former decision of this court:
>
> "The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real

advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith." *Atlantic Works* v. *Brady*, 107 U. S. 192, 200.

In view of our conclusion that plaintiff cannot recover under the first issue, further discussion of the other points made by the defendant is unnecessary. The petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## THE CHOCTAW NATION v. THE UNITED STATES

[No. F-182. Decided April 6, 1936]

*On the Proofs*

*Right of Mississippi Choctaws to share in communal funds of Choctaw Nation.*—It is settled that under the Dancing Rabbit Creek Treaty of 1830 the Mississippi Choctaw Indians are entitled to a *per capita* share in the communal funds of the Choctaw Nation.

*Liability of United States for funds of Choctaw Nation advanced Mississippi Choctaws.*—Where under authority of an act of Congress communal funds of the Choctaw Indian Nation were advanced by the Government to meet an obligation of the Mississippi Choctaws, repayment to the Nation to be made from *per capita* funds of the Mississippi Choctaws as they should accrue, which course is being followed, and inability on the part of the Mississippi Choctaws to so repay the balance of such funds yet unpaid is not shown, the Choctaw Nation is not entitled to recover such balance from the United States.

*The Reporter's* statement of the case:

*Mr. W. F. Semple* for the plaintiff. *Messrs. W. B. Johnson, R. M. Rainey*, and *Streeter B. Flynn* were on the brief.

*Mr. C. H. Small*, with whom was *Mr. Assistant Attorney General Harry W. Blair*, for the defendant. *Mr. George T. Stormont* was on the brief.

The court made special findings of fact as follows:

1. The act of Congress approved June 7, 1924, 43 Stat. 537, as modified by the Joint Resolution approved May 19, 1926, 44 Stat. 568, provided

> That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.
>
> SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this act. The claim or claims of each of said Indian nations shall be presented separately or jointly by petition in the Court of Claims, and such action shall make the petitioner party plaintiff or plaintiffs and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and said contract with such Indian tribe shall be executed in behalf of the tribe by the governor or principal chief thereof, or, if there be no governor or principal chief, by a committee chosen by the tribe under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior: *Provided, however*, That the attorney or attorneys employed as herein provided may be assisted by the regular tribal attorney or attorneys employed under existing law under direction of the Secretary of the Interior, with such additional reasonable and necessary expenses for said tribal attorneys to be approved and paid from the funds of the respective tribes under the direction of the Secretary of the Interior, as may be required for the proper conduct of such litigation. Official letters, papers, doc-

uments, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of the above-named Indian nations to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nations.

SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nations, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

SEC. 5. That upon the final determination of any suit instituted under this Act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid any attorney or attorneys, other than the regular tribal attorney or attorneys employed under existing law, employed by said Indian nations for the services and expenses of said attorneys rendered or incurred subsequent to the date of approval of such contract: *Provided*, That in no case shall the aggregate amounts decreed by said Court of Claims for services and expenses be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States.

SEC. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case.

**2.** Under the provisions of the act of June 7, 1924, plaintiff tribe filed its petition herein on July 7, 1926, and on July 29, 1931, filed its amended petition.

Reporter's Statement of the Case

3. There was paid on November 12, 1922, to Robert L. Owen and his associates the total sum of $175,000, pursuant to the act of Congress of September 22, 1922 (42 Stat. 1038, 1053), which act provides in part as follows:

> The Secretary of the Interior is hereby authorized to pay to Robert L. Owen and associates, who are plaintiffs in the case of Wirt K. Winton, Administrator of Charles F. Winton, deceased, and others against Jack Amos and others, in case Numbered 29821, the sum of $175,000 out of any funds now or hereafter due the Mississippi Choctaws under the judgment of the Court of Claims rendered on June 12, 1922, in favor of the above-cited plaintiffs against the Mississippi Choctaws; meeting the deficiency out of the reserve for unpaid Choctaw per-capita funds and reimbursing the same out of the funds hereafter due said Mississippi Choctaws per capita.

4. Of the total sum of $175,000 so paid to Robert L. Owen and his associates, $35,843.25 was paid from the individual Indian money accounts of Mississippi Choctaws, the remaining $139,156.75 being advanced from undivided moneys belonging to the Mississippi Choctaws and carried in the Choctaw tribal funds under the caption: "Indian Moneys, Proceeds of Labor, Choctaw Unallotted Land."

Subsequent to the advancement of the sum of $139,156.75, and to wit, from February 8, 1923, until and including July 14, 1930, there have been recouped from individual Mississippi Choctaws and deposited to the accounts of the Choctaw Nation various amounts totaling the sum of $74,026.03.

Of the sum of $175,000 paid to Robert L. Owen and his associates there remains unpaid a balance of $65,130.72 hereafter due the tribal funds of the Choctaw Nation from the Mississippi Choctaws.

5. The Choctaw Nation may and does receive income from coal royalties, the sale of unallotted lands, timber, mineral deposits, right-of-way to railroads, and from damages to lands through which pipe lines pass, as well as other sources. The Nation still possesses common property having a market value, and the Mississippi Choctaws have precisely the same interest therein as members of the Choctaw

Nation, including individual allotments of equal value in the landed domain of the Nation.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The special jurisdictional act appearing in Finding 1 discloses the nature of this case as one between the Choctaw Nation of Indians and the United States growing out of an Indian treaty and an act of Congress.

The facts, not open to dispute, disclose that on April 26, 1906 (34 Stat. 137), Charles F. Winton and others were by a special jurisdictional act authorized to sue in this court to recover upon the basis of *quantum meruit* for services rendered and expenses incurred "in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation." Robert L. Owen was an associate of Winton, and, as such, active in securing the passage of legislation which resulted in granting to Mississippi Choctaws the right of citizenship in the Choctaw Nation.

The estate of Winton and a large number of other representatives of Mississippi Choctaws—the latter being authorized to sue under an amendment to the act of April 26, 1906, passed May 29, 1908 (35 Stat. 457)—filed petitions in this court to recover compensation for their respective services rendered to Mississippi Choctaws in securing their identification by the Dawes Commission and subsequent enrollment as members of the Choctaw Nation. The litigation was exclusively a controversy as to whether the plaintiffs were entitled to recover for services rendered during the prolonged existence of the contest over the rights of Mississippi Choctaws under Article XIV of the treaty of September 27, 1830 (7 Stat. 333), known as the "Dancing Rabbit Creek treaty."

This court on May 29, 1916, dismissed the petitions as to all parties plaintiff. *Estate of Winton et al.* v. *Amos et al.*, 51 C. Cls. 284. The Supreme Court on appeal reversed the judgment of this court as to the claim of Robert L. Owen and associates, remanded the case for further find-

ings of fact in accord with the opinion of the court (255 U. S. 373), and thereafter this court in pursuance of the order of remand awarded to Robert L. Owen and associates a judgment for $175,000 in accord with the terms of the special jurisdictional act.

September 22, 1922 (42 Stat. 1048, 1053), Congress appropriated by the following enactment the sum of $175,000 in satisfaction of said judgment, viz:

> The Secretary of the Interior is hereby authorized to pay to Robert L. Owen and associates, who are plaintiffs in the case of Wirt K. Winton, administrator of Charles F. Winton, deceased, and others, against Jack Amos and others, in case numbered 29821, the sum of $175,000, out of any funds now or hereafter due the Mississippi Choctaws under the judgment of the Court of Claims rendered on June 12, 1922, in favor of the above-cited plaintiffs against the Mississippi Choctaws; meeting the deficiency out of the reserve for unpaid Choctaw per capita funds and reimbursing the same out of the funds hereafter due said Mississippi Choctaws per capita.

November 12, 1922, the cashier and special disbursing agent for the Five Civilized Tribes in Oklahoma, of which the Choctaw Nation was one, paid by check to Robert L. Owen $175,000, in satisfaction of the judgment of this court. The above official determined the individual contributions due from Mississippi Choctaws at $106.45, and from official records ascertained that $35,843.25 was to be charged to the individuals whose accounts disclosed sufficient funds on hand to pay the $106.45 and the general fund of the Choctaw Nation was credited with the above amount, leaving due this fund from the Mississippi Choctaws the sum of $139,156.75, advanced by the nation to pay the judgment.

The source of income to the Choctaw Nation, as stated by the cashier and disbursing officer, was "Indian moneys, proceeds of labor, Choctaw unallotted lands," and from this source since November 1922 there has been collected from year to year from individual Mississippi Choctaws and credited to the general fund of the nation the further sum of $74,026.03, leaving due from the Mississippi Choctaws a balance of $65,130.72.

The grounds for recovery alleged in plaintiff's original petition were that the Mississippi Choctaws were not entitled under the Dancing Rabbit Creek Treaty to participate in the *per capita* distribution of the communal funds of the Choctaw Nation, and that the *per capita* distribution made to them by officials of the United States was without warrant of law and hence recoverable.

In the case of the *Choctaw Nation* v. *United States*, 81 C. Cls. 1, the court in an opinion held that the Mississippi Choctaws in virtue of Article XIV of the Dancing Rabbit Creek Treaty and subsequent acts of Congress, were entitled to a *per capita* share of the communal funds of the Choctaw Nation. On November 25, 1935 (296 U. S. 643), the Supreme Court denied certiorari. The plaintiff now concedes the final determination of this issue.

The contention now advanced is that while the Congress possesses plenary authority to administer Indian tribal lands and funds, the effect of what was done amounted to a confiscation of plaintiff's tribal funds, which of course would be illegal. To sustain the contention an argument is made that there may never be sufficient funds from the sale of the communal property of the tribe to enable the Mississippi Choctaws to pay the balance due the nation, and that manifestly no obligation existed upon the part of the nation to pay the judgment awarded.

The fallaciousness of the contention is apparent. The plaintiff falls into the error of asserting a possibility of a default in reimbursing the nation for its advancements without proof of the exhaustion of assets from which the balance can be paid. At the present time funds of the nation have not been confiscated. They have, it is true, been advanced or loaned, but both the ability to pay and resources of the Mississippi Choctaws negative a positive assertion that the balance will not and cannot be paid.

The record establishes the source from which the communal funds of the nation arise, viz, from coal royalties, the sale of unallotted lands, timber, mineral deposits, right-of-way to railroads, from damages occasioned by defective pipe lines passing through tribal lands, and from other

sources. The Mississippi Choctaws own their individual allotments, and their right to *per capita* distribution of tribal funds remains unimpaired. In no event could the plaintiff recover more than the unpaid balance of reimbursement money, and this fact alone precludes the intent of Congress to appropriate the funds of the nation to discharge a debt of the Mississippi Choctaws.

The petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

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## ROBERT W. ATKINS v. THE UNITED STATES

[No. 42061. Decided April 6, 1936]

*On the Proofs*

*Income tax; deduction of loss of prior year; loss in trade or business of taxpayer.*—Where the taxpayer's regular business was that of an employee of a brokerage firm in New York City, loss sustained by him in 1927 on a total of three real estate investments by himself and an associate on their own personal account in prior years was not loss attributable to the operation of a trade or business regularly carried on by him, and therefore could not be taken by him as a deduction from gross income in his income-tax return for the year 1928.

*The Reporter's* statement of the case:

*Mr. Alex M. Hamburg* for the plaintiff.

*Mr. Joseph H. Sheppard,* with whom was *Mr. Robert H. Jackson, Assistant Attorney General,* for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of the State of New York.

2. Plaintiff filed his individual tax return for the calendar year 1927 in which he showed a loss of $56,186.33 and no tax due. In arriving at the loss of $56,186.33 plaintiff claimed deductions in his return of $132,895.05 on account of certain real-estate transactions, which were set out in the return as follows:

Reporter's Statement of the Case

| | | |
|---|---|---|
| 1. Lots 7, 8, and 9, Aquarium site, Miami Beach, Fla., acquired Feb. 11, 1926, at a purchase price of | $125,000.00 | |
| Defaulted on note due Feb. 11, 1927, and notes maturing thereafter, in the total amount of | 43,333.34 | |
| Loss claimed | | $81,666.66 |
| 2. Lots 11 and 12, Block B, and lots 13 and 14, Block I, Hollywood Hills, Florida, acquired August 5, 1925, at a cost of | $13,400.00 | |
| Defaulted on installment due February 3, 1927, and subsequent installments in the total amount of | 8,709.99 | |
| Loss claimed | | $4,690.01 |
| 3. Lot 1, Block 1, Nautilus Division, Miami Beach, Florida, acquired June 13, 1925, at a cost of | 28,000.00 | |
| House constructed thereon (completed during 1926) at a cost of | 128,538.38 | |
| Total cost | 156,538.38 | |
| House and lot sold during 1927 for | 110,000.00 | |
| Loss claimed | | 46,538.38 |
| Total loss claimed | | $132,895.05 |

Upon an examination of plaintiff's books in connection with claim for refund for 1928, referred to in finding 4, the Commissioner of Internal Revenue found, and defendant now concedes, that the losses as shown in the return are in accord with the books of account as kept by plaintiff. In that examination the loss as shown on the return was reduced from $56,186.33 to $55,676.33.

**3.** March 15, 1929, plaintiff filed his individual income tax return for 1928 showing net income of $82,210.88 and a tax due of $10,805.71, which latter amount was paid in quarterly installments as follows:

| | |
|---|---|
| March 16, 1929 | $2,701.43 |
| June 15, 1929 | 2,701.43 |
| September 14, 1929 | 2,701.43 |
| December 1, 1929 | 2,701.42 |

Thereafter, pursuant to an audit of plaintiff's return, the Commissioner made an additional assessment of $338.39 for

1928, which, together with interest in the amount of $39.25, was paid March 10, 1931.

**4.** March 14, 1931, plaintiff filed a claim for refund for 1928 in the amount of $10,433.20 and assigned the following basis therefor:

> The claimant is engaged in the banking business and deals in securities and other properties with a view to profit. The result of his business operations for the taxable year 1927 resulted in a net loss of $56,186.33. For the year 1928 his business operations resulted in a net profit upon which tax was paid without claiming deduction allowed by Section 117 of the Revenue Act of 1928.

September 16, 1931, and January 7, 1932, the Commissioner advised plaintiff that the claim for refund would be rejected on the ground that the loss sustained in 1927 was not sustained in a trade or business regularly carried on by him and therefore under the applicable statute could not be carried forward and allowed as a deduction in determining his tax liability for 1928. The claim was disallowed on a schedule dated July 14, 1932.

**5.** Prior to 1925 plaintiff had been interested in various activities, including real estate business, purchase and sale of stocks and bonds, hotel, race track and casino promotions and operations, advancing money on business enterprises, and the sugar business.

**6.** From 1909 to 1925 plaintiff visited Florida on various occasions, and became interested in investing in real estate in that State. He was also there in the winter of 1925–26 and in the fall of 1926, and has been there once or twice a year since that time.

In June 1925 plaintiff acquired the lot in the Nautilus Division, Miami Beach, Florida (referred to as item 3 in finding 2) at a cost of $28,000. He thereafter constructed a house thereon at a cost of $128,538.38, the house being completed in 1926. He sold the house and lot in 1927 for $110,000. The house was built for the purpose of sale, and was not occupied by plaintiff as a residence, plaintiff having lived at the time in New York and Boston.

Plaintiff purchased the unimproved lots in Hollywood Hills, Florida (referred to as item 2 in finding 2), in 1925

at a cost of $13,400. Plaintiff also purchased certain other unimproved lots in Miami Beach, Florida, in or about 1926. As a whole he invested approximately $300,000 in Florida real estate in 1925 and 1926. The foregoing properties were purchased for resale.

**7.** In carrying out the transactions referred to in finding 6, plaintiff had associated with him one William Flagg, who was then engaged in real-estate speculation in Florida. The money was furnished by plaintiff and the investments were made by Flagg. The arrangement between the two parties was that they would share profits and losses equally, though in the three transactions here in controversy plaintiff recovered nothing from Flagg on account of the losses sustained.

**8.** In April 1926, plaintiff entered the employ of Hayden, Stone & Co., New York City, a concern which did a brokerage business, where he was engaged in meeting customers, developing business propositions, and similar activities. His salary at the beginning was $100 per week, but this was rapidly increased so that in 1927 and 1928 he received $25,000 and $30,000 per year, respectively.

Under the terms of his employment with Hayden, Stone & Co., plaintiff was required to give his full time to that work in the event it was demanded. However, plaintiff's entire time was not demanded by Hayden, Stone & Co., and he was accordingly permitted to engage in certain business activities for his own individual profit and advantage. To that end he dealt extensively in stocks and bonds during 1927 and 1928 on his own and his wife's account, his transactions amounting to approximately $1,700,000 in 1927 and $2,500,000 in 1928, and in each year he realized a net profit on these activities. In addition he gave some time during 1927 to his investments in Florida real estate (heretofore referred to) through advice to his associate, Flagg, and in connection with matters relating to their financing and disposition. The Florida properties were finally disposed of in 1927.

Plaintiff kept books of account in which he had recorded the personal transactions referred to above. An employee of Hayden, Stone & Co. was paid extra compensation by plaintiff to act as his secretary and bookkeeper and such

employee performed the work outside of her regular hours of employment with Hayden, Stone & Co.

In preparing his tax returns for the years 1926, 1927, 1928, and 1929, the plaintiff stated that his occupation was that of "banker."

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff seeks to recover $10,433.20, an alleged overpayment of his Federal income tax for the calendar year 1928. The claim is based on the contention that the plaintiff is entitled to deduct from his gross income for the year 1928 the amount of a loss sustained by him in the year 1927.

Plaintiff's income tax return for the year 1927 showed a loss of $56,186.33 and no tax due. In arriving at the amount of the loss plaintiff took deductions in his return of $132,895.05 on account of certain Florida real-estate transactions. The Commissioner of Internal Revenue upon subsequent audit of the return reduced the loss to $55,676.33.

Plaintiff's income tax return for the year 1928 showed a net taxable income of $82,210.88 and a tax due of $10,805.71, which was duly paid. Plaintiff made no claim in the return for a deduction from gross income because of the loss sustained in the preceding year, but subsequently filed a claim for refund in respect to the taxes paid on the return, assigning the following grounds therefor:

> The claimant is engaged in the banking business and deals in securities and other properties with a view to profit. The result of his business operations for the taxable year 1927 resulted in a net loss of $56,186.33. For the year 1928 his business operations resulted in a net profit upon which tax was paid without claiming deduction allowed by Section 117 of the Revenue Act of 1928.

The Commissioner disallowed the claim for refund on the ground that the loss sustained in 1927 was not sustained in a trade or business regularly carried on by plaintiff, and therefore could not be carried forward to the year 1928

Opinion of the Court

under the provisions of section 117 of the Revenue Act of 1928. This section, so far as here pertinent, reads:

> SEC. 117. NET LOSSES. (a) DEFINITION OF "NET LOSS."—As used in this section the term "net loss" means the excess of the deductions allowed by this title over the gross income, with the following exceptions and limitations:
>
> (1) NONBUSINESS DEDUCTIONS.—Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business;
>
> * * * * *
>
> (e) NET LOSS FOR 1926 OR 1927.—If for the taxable year 1926 or 1927 a taxpayer sustained a net loss within the provisions of the Revenue Act of 1926, the amount of such net loss shall be allowed as a deduction in computing net income for the two succeeding taxable years to the same extent and in the same manner as a net loss sustained for one taxable year is, under this Act, allowed as a deduction for the two succeeding taxable years.

The definition of net losses in section 206 (a) (1) of the Revenue Act of 1926 is the same as that given in section 117 (a) (1) of the 1928 act above quoted.

The sole question is whether the losses sustained by plaintiff during the year 1927 in connection with his transactions in Florida real estate were incurred in the operation of a trade or business regularly carried on by him.

What constitutes a trade or business for net loss purposes under the various Revenue Acts has been stated by the courts and the Board of Tax Appeals in numerous cases, and that question has been quite definitely settled. In *Rogers* v. *United States*, 70 C. Cls. 159, 41 Fed. (2d) 865, this court said:

> The words "trade or business", as used in the statute in connection with losses, has been held by the courts to mean and refer to a regular occupation or calling of the taxpayer for the purpose of livelihood or profit. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; *Allen* v.

*Commonwealth*, 188 Mass. 59, 74 N. E. 287, 69 L. R. A. 599.

While it has been recognized and held by the courts and by the Board of Tax Appeals that a person can be engaged in more than one trade or business, and that it is not necessary that the trade or business in which a deduction is sought forms a taxpayer's principal trade or business, it is required that his activities shall be such that they may of themselves be regarded as an occupation or business. A single isolated activity or transaction is not sufficient to constitute a business or trade. *J. J. Harrington*, 1 B. T. A. 11; *Fridolin Pabst*, 6 B. T. A. 843; *Harry J. Gutman*, 7 B. T. A. 500.

In *Dalton et al.* v. *Bowers*, 56 Fed. (2d) 16, Judge Manton, speaking for the Circuit Court of Appeals, Second Circuit, said:

> By the statute, allowing the deductions and carrying over the loss for two years, Congress intended to give relief to persons engaged in an established business for losses incurred during a year of depression in order to equalize taxation in the two succeeding and more profitable years. It was not intended to apply to occasional or isolated losses.

This language was quoted with approval by the Supreme Court in *Dalton* v. *Bowers*, 287 U. S. 404.

The extent of the plaintiff's real estate dealings was limited to three purchases of lots in Florida, two in 1925 and one in 1926, and the disposition of such lots in 1927 at a loss of $132,895.05. The plaintiff stated in his income tax returns for the years 1926, 1927, 1928, and 1929, that his occupation was that of "banker." Prior to the date of his investments in Florida lots it appears plaintiff was in the promotion and finance business generally in connection with hotels, race track and casino properties, real estate, sugar and other business enterprises, also the purchase and sale of stocks and bonds. From early in 1926 and during the years 1927 and 1928, he held a position with the brokerage firm of Hayden, Stone & Co., of New York, receiving a salary of $25,000 for 1927 and $30,000 for 1928. Under the terms of his employment he was permitted to engage in other activities for his own individual profit and ad-

Syllabus

vantage, which he did, and in 1927 and 1928 dealt extensively in stocks and bonds on his own and his wife's account, such transactions amounting to $1,700,000 in 1927 and $2,500,000 in 1928, upon which he realized a net profit for each of the years.

We think it clear that plaintiff's investments in Florida real estate were isolated transactions in no way connected with any trade or business regularly carried on by him. The loss sustained by him on the disposition of these properties in 1927 was properly deducted from gross income for that year under section 214 (a) (5) of the Revenue Act of 1926 as a loss incurred in transactions "entered into for profit, though not connected with the trade or business." Such loss, however, was not a net loss within the meaning of the Revenue Acts of 1926 and 1928 which could be carried over and deducted from gross income in a subsequent year.

The plaintiff is not entitled to recover. The petition is dismissed.

It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## SWEDISH-AMERICAN LINE v. THE UNITED STATES

[No. 42231. Decided April 6, 1936]

*On the Proofs*

*Refund of fines for transporting diseased immigrants to United States; legality of action of immigration authorities.*—Where the Secretary of Labor decides that certain aliens transported to the United States by the plaintiff, a steamship company, were so afflicted with disease at the time of their foreign embarkation as to be ineligible under the law for entry into the United States, and that such diseased condition might have been detected by a competent medical examination at the time of their embarkation, his decision and consequent action imposing upon the plaintiff the statutory penalties applicable in

such cases are to be sustained by the court in the absence of evidence showing his action to have been arbitrary and unfair.

*The Reporter's* statement of the case:

*Mr. A. Warner Parker* for the plaintiff.

*Mr. Wm. S. Ward*, with whom was *Mr. Assistant Attorney General George C. Sweeney*, for the defendant.

This suit was brought to recover two fines, one for $1,000 plus $160.50 passage money and the other for $1,000, imposed on plaintiff by the Secretary of Labor under section 9 of the Immigration Act of 1917 as amended by section 26 of the Immigration Act of 1924, U. S. Code, title 8, section 145, for bringing to this country aliens afflicted with tuberculosis. One of the aliens arrived October 7 and the other October 24, 1926.

The principal question presented is whether the decisions of the Secretary of Labor were arbitrary and illegal inasmuch as he did not submit plaintiff's protests and exhibits, consisting of certificates of examinations from physicians who had examined the aliens at port of embarkation, to the U. S. Public Health surgeons who had certified to the presence of the disease upon arrival of the aliens in the United States and that such disease might have been detected by competent medical examination at the port of embarkation.

Plaintiff contends that the medical examinations made abroad were competent and satisfied the provisions of the statute and that the decisions of the Secretary on the records before him, without submitting the same to the U. S. Public Health surgeons at Ellis Island, were arbitrary and illegal. The defendant denies this and contends that the decisions of the Secretary were supported by facts before him and were therefore not arbitrary and that, in such circumstances, he was not required to submit the certificates of the physicians in Sweden to the Public Health physicians for their opinion as to the competency of the examinations at the port of embarkation.

The defendant also further contends that the fines were not paid involuntarily or under protest and are therefore not recoverable.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the Kingdom of Sweden. It is the owner and operator of passenger and freight vessels which ply between ports of Sweden and ports of the United States. Two of such vessels operated by plaintiff are known as the motorship *Gripsholm*, and the steamship *Drottningholm*.

The laws of the Kingdom of Sweden permit citizens and corporations of the United States the right to prosecute claims against the Kingdom of Sweden in its courts.

2. Tage W. Larsson, an alien, was brought from Goteborg, Sweden, to the United States by plaintiff on its motorship *Gripsholm* which sailed Sept. 5 and arrived at Ellis Island, New York, on October 4, 1926. A hearing with reference to this alien was held before a board of special inquiry at Ellis Island on October 8, 1926, as a result of which a certificate was issued by the medical officers of the United States Public Health Service as follows:

> Larsson, Tage W., 24, male, single, Sweden, Scand. October 8, 1926, 1:55 p. m. Present: Messrs. McCullough (chmn), O'Connor, and Jackson. Interpreter: Mordt.
>
> Tuberculosis, Insp. Walsh. SI 9, S.S. *Gripsholm* (Swed. Amr.) II cl. Embarked at Goteborg 9/25/26. Arrived Ellis Island 10/4/26. Placed in hosp. on arrival.
>
> Medical certificate no. 3508, 10/7/26.—This is to certify that the above described person has this day been examined and is found to be afflicted with tuberculosis, pulmonary, chronic, active, which is not easily curable. In our opinion, the condition herein certified might have been detected by competent medical examination at the foreign port of embarkation.
>
> Surgeons: A. J. Ashemeyer, R. L. Beadles.

The board, by unanimous vote, excluded the alien as one afflicted with tuberculosis. He was deported on the motorship *Gripsholm* on a sailing October 9, 1926.

3. The Commissioner of Immigration, under date of October 27, 1926, served notice on plaintiff of an intention to impose a fine in the case of Tage W. Larsson, by the following letter:

> You are hereby notified that the certificate of the examining surgeon, based upon a physical and mental examination of the alien whose name is shown herein, indicates that a fine should be imposed under the provisions of section 26 of the "Immigration Act" of 1924.
>
> If you desire a hearing as to whether a fine should be imposed in this instance, you will be allowed sixty days from the date of this notice for that purpose, and the vessel on which the said alien arrived will be granted clearance papers when she is ready to sail and allowed to proceed upon her outwardbound voyage upon condition that you deposit with the collector of customs at this port, prior to her sailing, the sum indicated [of $160.50, passage refund, and $1,000] as security for the payment of the said fine should it be imposed.

4. Plaintiff, on December 9, 1926 made written protest against the imposition of such fine to the Commissioner of Immigration at Ellis Island as follows:

> We herewith protest against the assessment of a fine of $1,000 also passage money refund of $160.50 for bringing Tage W. Larsson, certified as having tuberculosis.
>
> Section 26 of the Immigration Act of 1924 states that a line is libel when a disease occurs, that the existence of such mental or physical defect might have been detected by means of a competent medical examination. Therefore, a line is *not* libel if a disease is not discovered after a competent medical examination. Here is such a case that has occurred through no laxness on our part.
>
> On September 20th, 1926, Tage Larsson consulted a reputable physician, Dr. K. Nordquist, as Larsson observed that he (Larsson) was drawing blood and wished to be certain that it was not tuberculosis. After a thorough examination Dr. Nordquist declared him free from this disease, as is shown by his attached certified statement attested to by the American Consul, as Larsson had no symptoms, despite the blood, namely no fever, no tiredness, etc. Two days later, September 22d, another examination was made of Larsson, this time by our shore physician, Dr. Albert Rubenson, who gave

the same verdict as per his attached statement. Three days later Larsson sailed for this country.

Here you have two different doctors, fully conversant with this disease and at the time of the examination particularly on the watchout for tuberculosis, declaring that this defect was not evident. We then forwarded the man, for we certainly had taken all possible precaution, as both of the doctors agreed in their diagnosis. Both of these men are competent; Dr. Nordquist being a well-known physician in Gothenburg, while Dr. Rubenson once was the doctor in charge of the United States Public Health Service at Gothenburg, who surely would not have appointed him if they were not confident of his competency. Dr. Rubenson, in view of his previous experience with the Health Service, is entirely conversant with the U. S. Immigration Laws in detail and certainly would not have approved his forwarding had the slightest suspicion been in his mind that this man was a carrier of such a disease.

We know that Larsson was sick when he arrived here and for that matter is still in this condition, but inasmuch as we had two competent physicians examine him, after which we were guided by their verdict, we feel that no fine should be assessed in this case, as we have complied with the Immigration Act to the smallest detail. We, therefore, thank you for reopening this matter and ask for a reversal of the earlier decision. We will be represented before the Bureau by our Washington lawyer, Mr. A. Warner Parker.

Attached to this protest was a certificate of Dr. K. Nordquist of Gothenburg, dated Nov. 2, 1926, as follows:

On Sept. 20th, 1926, Mr. Tage Larsson consulted me. He had during the night been hawking blood and at the same time some blood was coming from his nose. No coughing. Temperature at the time of examination was 37.2, Cent. (98.96 Fahrenheit). No fatigue, neither any other general symptoms.

As, upon examination of the lungs, no disease or disorder whatsoever could be certified, the blood expectoration was supposed to be caused by nosebleed.

To all of this I solemnly swear upon my oath.

Also, a certificate of Dr. Albert Rubenson, of Gothenburg, of the same date, as follows:

According to the medical record of my practice kept by me a person by name of Tage Larsson was examined

on Sept. 22nd, 1926, because a small quantity of blood was coming up in his mouth which he though was caused by and indicated disease of his lungs, but no signs of lung disease could be discovered by me upon examination, which I hereby solemnly swear on my oath.

5. December 13, 1926, the commissioner of immigration at Ellis Island forwarded to the Commissioner General of Immigration at Washington the notice of liability for fine in the case of Tage W. Larsson, together with the protest and accompanying certificate. On December 30, 1926, plaintiff filed its brief with the Bureau of Immigration of the Department of Labor.

January 24, 1927, the Commissioner General of Immigration wrote a letter to the commissioner of immigration at Ellis Island, New York, which was approved by the Second Assistant Secretary of Labor as follows:

Reference is made to your letter of December 13th, no. 98974/859, relative to a proposed fine against the S. S. *Gripsholm*, arriving on October 4, 1926, for bringing to the United States the alien Tage W. Larsson, who was certified as being afflicted with chronic, active, pulmonary tuberculosis which, in the opinion of the examining Public Health surgeons, might have been detected by means of a competent medical examination at the foreign port of embarkation.

The protest of the line against the imposition of a fine, dated December 9th, with its supporting papers, and that of its Washington attorney, dated December 30th, have been reviewed. These, in brief, set forth that the alien was accorded two separate examinations prior to being accepted for transportation, and that the medical examiners had in view, particularly, the possibility that the alien might be afflicted with tuberculosis. Both examinations were negative, it is said, and it is contended that the line is not liable to penalization if a competent medical examination was accorded at the foreign port, regardless of whether the disease was then discovered, as the intent of the law has been complied with. Medical certificates are forwarded to show that the examinations given abroad were accorded by competent physicians and that such action was taken as ought to have been taken to prevent a violation of law. It is pointed out that both physicians who examined this alien abroad were competent and that one

of them was formerly in charge of the U. S. Public Health Service at Gothenburg.

The nature of the disease, and the terms of the official medical certificate indicate so strongly that the alien had been suffering therefrom for a considerable time, that it is believed that the said disease not only existed, but that it might have been detected by means of a competent medical examination, at the time the applicant was embarked. It seems evident that there was carelessness on the part of the medical examiners at the foreign port as it is not conceivable that the condition of the alien could not have been diagnosed properly had adequate care been taken.

It is ruled that the penalty as provided in section 26 of the act of May 26, 1924, should be *imposed*. You are directed, therefore, to take appropriate action whereby the sum of $1,000 may be deposited in the Treasury as an immigration fine on account of this alien. Passage money, in the sum of $160.50, is to be returned to the alien, he having been deported.

January 24, 1927, the Commissioner General of Immigration advised plaintiff's attorney that a fine of $1,000 had been imposed, and that passage money in the sum of $160.50 had been ordered returned to the alien.

January 27, 1927, the commissioner of immigration at Ellis Island gave written notice to the collector of customs at New York that the fine of $1,000 had been imposed against plaintiff in the case of Tage W. Larsson, which amount was to be covered into the Treasury, and that $160.50, passage money, was to be returned to the alien. A copy of this notice was served on plaintiff.

January 31, 1927, plaintiff paid to the collector of customs at New York the amount of $1,160.50.

**6.** Olaf G. Anderson, an alien was brought from Goteborg, Sweden, to the United States by plaintiff on its steamship, *Drottningholm*, which sailed from Goteborg August 14 and arrived at Ellis Island on August 24, 1926. A hearing with reference to Anderson was held before a Board of Special Inquiry at Ellis Island on August 30, 1926. A certificate was issued by the medical officers of the United States Public Health Service, as follows:

**Anderson, Olaf, 37, male, married; Anderson, Alma, 38, female, married; Anderson, Szarda, 15, female, sin-**

gle; Anderson, Surl, 14, female, single; Anderson, Karin, 7, male, single (Harin); Anderson, Annata, 4, female, single; Anderson, Anna, 3, female (Greta). Sweden, Scand. August 30/26/1:35 p. m. Present: Messrs. Travis (Chmn.) Stimpson and Greiner.

LPC. Tuberculosis, S. Johnson, Insp. S. I. no. 5, S. S. *Drottningholm*, S. A. 8/24/26/3rd cl. From Gothenburg, 14th inst. Coming to work and remain permanently. Mordt, Int.

Medical Certificate: Olaf, Ellis Island 8/16/26/ no. 1800. (671) This is to certify that the above described person has this day been examined and is found to be afflicted with tuberculosis, pulmonary, chronic, far advanced. Which is not easily curable. In our opinion the condition herein certified might have been detected by competent medical examination at the foreign port of embarkation.

H. A. RASMUSSEN, *Asst. surgeon.*
R. L. BEADLES, *A. A. Surgeon.*

Olaf G. Anderson, the alien, in testifying before the Board of Special Inquiry as to his physical condition, in answer to the question

> Have you always been in good health? replied, Yes. With the exception of six years ago when I had a little water on the right lung.

The alien was excluded by unanimous vote of the Board on the ground that he was afflicted with tuberculosis, and he was deported on September 11, 1926.

7. The Commissioner of Immigration on October 11, 1926 served notice on plaintiff of an intention to impose a fine by the following letter:

> You are hereby notified that the certificate of the examining surgeon, based upon a physical and mental examination of the alien whose name is shown herein, indicates that a fine should be imposed under the provisions of section 26 of the "Immigration Act of February 5, 1917."
>
> If you desire a hearing as to whether a fine should be imposed in this instance, you will be allowed sixty days from the date of this notice for that purpose, and the vessel on which the said alien arrived will be granted clearance papers when she is ready to sail and allowed to proceed upon her outwardbound voyage upon condi-

tion that you deposit with the Collector of Customs at this port, prior to her sailing, the sum indicated [of $125, passage refund, and $1,000] as security for the payment of the said fine should it be imposed.

8. December 8, 1926, plaintiff protested the imposition of such fine in a letter to the Commissioner of Immigration as follows:

> Appeal is herewith made against the imposition of a fine of $1,000 and refund of passage money $125 for forwarding Olaf G. Anderson, alleged to be afflicted with tuberculosis.
>
> The immigration law states that transportation companies must exercise reasonable diligence and precaution against forwarding a person who does not comply with the immigration laws. This we have done.
>
> This man was examined by a reputable doctor, Dr. A. J. Anmeus, on July 23d, 1926, at his home city Boden, Sweden. No symptoms of tuberculosis were disclosed at that time, as is shown by the enclosed doctor's examining report (marked Exhibit A) herewith attached and duly attested to by the American Consulate. Kindly observe that this examination was made only three weeks prior to his departure in the "Drottningholm" August 14th, 1926.
>
> Just before the embarkation, Anderson and his family were once again put to a very scrutinizing medical examination, not only by our ship's doctor, but also by our land physician, who previously was connected with the United States Health Division, thereby showing that he is conversant with all the regulations of this country to the smallest detail. Both of these doctors passed Anderson as physically fit, as is proven by the enclosed documents marked "Exhibits B and C."
>
> Gentlemen, is not a favorable report by three different doctors just grounds that we have exercised due diligence and caution; for that matter, we go further, we claim we exercised extreme diligence and caution. We do not contend that this man did not show signs of tuberculosis upon arrival here, but we do maintain that such signs were not evident upon his embarkation and that this disease could not have been discovered at that time, except by X-ray, which is outside the scope covered by due diligence and precaution. Is it just therefore to assess a fine when we have lived up to all regulations not only in act but also in spirit?

We ask for a reopening of this case and await with confidence your unbiased decision. We will be represented before the Department by our Washington lawyer, Mr. A. Warner Parker.

Attached to this protest was a certificate dated Lulea, November 16, 1926 and signed by three persons, as follows:

Olov Gottfrid Anderson, carpenter, 37 years of age, from Boden, was examined by me on July 23rd, 1926. No symptoms of tuberculosis could then be found, which, upon request, is hereby certified.

(Signed.) A. J. ANMEUS,
*City Physician in Charge.*

Name: Olaf Gottfrid Anderson.
Country: Sweden.
Inspected and passed.
Goteborg, Aug. 1926.

(Signed, signature illegible),
*Passenger Inspector.*

Name: Olaf Gottfrid Anderson.
Country: Sweden.
Inspected and passed.
Goteborg, Aug. 1926.

ALBERT RUBENSON, M. D.,
*Passenger Inspector.*

**9.** December 15, 1926, the commissioner of immigration forwarded to the Commissioner General of Immigration, at Washington, the notice of liability for fine in the case of Olaf G. Anderson, with plaintiff's protest and accompanying certificate. On January 4, 1927, plaintiff filed its brief with the Bureau of Immigration in the Department of Labor.

February 2, 1927, the Commissioner General of Immigration wrote a letter to the commissioner of immigration at Ellis Island, which was approved by the Second Assistant Secretary of Labor, as follows:

Reference is made to your letter of December 15th, no. 98974/281, relative to a proposed fine against the S. S. *Drottningholm*, arriving on August 24, 1926, for bringing to the United States the alien Olaf G. Anderson, who was certified as being afflicted with chronic pulmonary tuberculosis, far advanced, which, in the opinion of the examining Public Health surgeons, might have been detected by means of a competent medical examination at the foreign port of embarkation.

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The protest of the line against the imposition of a fine, dated December 8th, with its numerous accompanying papers, and that of its Washington attorney, dated January 4th, have been reviewed with care. Briefly, these set forth that the alien was examined prior to embarkation, by three physicians, one of whom had served in the past in the U. S. Public Health Service, and that none discovered any signs of tuberculosis. It is contended that the examinations were all competent, and that the disease could have been detected only by X-ray, and that the use of this is outside the scope of a competent medical examination. Medical certificates showing inspection prior to embarkation are in the Bureau's file at this time, having been submitted with the company's protest.

The alien claimed that he had always been in good health and had had no difficulties of a physical nature save about six years ago, when he had "water on the right lung." Apparently he had been able to support his numerous family. The official medical certificate is, of course, the outstanding evidence in the case. In view of the three examinations given this alien prior to his embarkation the line might be relieved from responsibility were it not for the fact that the disease is far advanced. In the Bureau's opinion, the state of the disease makes it impossible to reach any other conclusion than that it existed at the time the alien embarked and that it might have been detected at that time by means of a competent medical examination. It is ruled, therefore, that the penalty as provided in section 26 of the act of May 26, 1924, should be *imposed*, and you are directed to take appropriate action whereby the sum of $1,000 may be covered into the Treasury as an immigration fine in this case. The amount of passage money, $135, is to be returned to the alien, he having been deported.

February 2, 1927, the Commissioner General of Immigration advised plaintiff's attorney that a fine of $1,000 had been imposed and that passage money in the sum of $125 had been ordered returned to the alien.

February 8, 1927, the commissioner of immigration advised the collector of customs at New York that a fine of $1,000 and passage money in the amount of $125 had been imposed against plaintiff in the case of the alien Olaf G. Anderson, that $1,000 was to be covered into the Treasury

and $125 was to be returned to the alien. A copy of this notice was served on plaintiff.

February 10, 1927, plaintiff advised the commissioner of immigration that the amount of $125 as passage money had already been repaid to the alien, Anderson, as required by Swedish law. Thereafter the Secretary of Labor canceled the requirement as to the paying of passage money to the collector of customs.

March 3, 1927, plaintiff paid the amount of $1,000 to the collector of customs at New York.

**10.** In neither the Larsson nor the Anderson case did the Secretary of Labor submit the protest and accompanying certificate which had been filed by plaintiff with the Department of Labor to the United States Public Health surgeons.

**11.** June 25, 1925, plaintiff had executed a bond, with sureties, to the collector of customs of the port of New York, in the penal amount of ten thousand ($10,000) dollars, conditioned as follows:

> Now, therefore, the condition of this obligation is such that if the above bounden principal shall pay to the collector of customs at the port of New York any and all fines and amounts of passage money found by the Secretary of Labor to be due and payable under the provisions of said Immigration Act of 1924, then this obligation to be void, otherwise to remain in full force and effect; the said principal to have, however, the privilege of making such payments under protest, and without prejudice to any and all legal rights of recovering by appropriate action or proceedings any and all sums so paid as fines or passage money under this bond.

This bond was on file with the collector of customs of the port of New York, and was at all times during the transaction set out in these findings in full force and effect.

**12.** By reason of this bond, plaintiff was not required to make deposits of the amounts of the fines, as set out in and as required by the notices of October 11 and October 27, 1926. Plaintiff did not make such deposits, nor was clearance withheld from plaintiff's ships *Gripsholm* and *Drottningholm*, pending the determination of plaintiff's liability to fine in the cases of said aliens.

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**13.** During the period here involved, according to the procedure in effect in the office of the collector of customs for the port of New York for the collection of fines imposed under the immigration laws by the Secretary of Labor, where the company had posted a blanket bond covering any fines that might be so imposed, a deposit of the amount of the proposed fine was not required at the time the notice of liability to fine was served on the company, and no steps were taken to collect the amount until the Secretary of Labor had finally imposed the fine. This procedure also provided that upon notice from the Secretary that a fine had been imposed, a stop order be placed against the vessel which had brought over the alien as to whom the fine was imposed, and clearance be withheld from the vessel until the fine was paid, notwithstanding the fact that bond had been posted. This procedure further provided that if the vessel was not then in the port of New York, clearance would be withheld at her next arrival at that port until the fine had been paid. This procedure was in effect from May 26, 1924, to December 6, 1933, following which there was a change in procedure.

**14.** Plaintiff's vessels were not detained, nor was clearance withheld from them at the time or prior to payments of the fines here involved. No specific notice was served on plaintiff, either at the time or prior to such payments to the effect that its vessels would be detained until the fines were paid. The fines were involuntarily paid by the plaintiff because of its knowledge of the practice then in effect in the office of the collector of customs, port of New York (finding 13), and by reason of its knowledge that under such procedure its vessels would if in port, or if not in port, upon their next arrival, be refused clearance, unless and until the respective fines were paid.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Each of the fines involved in this case was imposed by the Secretary of Labor as a result of the certificates of the examining U. S. Public Health surgeons that the aliens were

afflicted with tuberculosis and that this condition might have been detected at the foreign port of emigration by competent medical examination. Examinations were had by the Board of Special Inquiry and the records of the proceedings before this board were also before the Secretary, all of which he considered in connection with plaintiff's protests or appeals set forth in the findings. Section 9 of the Immigration Act of 1917 as amended by section 26 of the Act of 1924, U. S. Code, title 8, section 145, makes it unlawful for any person or company to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with tuberculosis in any form and provides that "if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company * * * shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed." Section 16 of the Act of 1917, U. S. Code, title 8, section 154, provides that "The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service * * * who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien."

The controlling question is whether the decisions of the Secretary of Labor imposing the fines were arbitrary and unfair. We think they were not in the light of the record before him. Plaintiff relies upon the case of *Lloyd Sabaudo Societa Anonima Per Aziono* v. *Elting*, 287 U. S. 329. We

think that case, so far as it relates to the alien Fusco, which is the portion of the opinion upon which plaintiff relies, is distinguishable on the facts and is, therefore, not controlling here. It involved thirteen fines imposed by the Secretary under section 9 of the Act of 1917 and under that section as amended by the Act of 1924 for bringing to this country diseased aliens or aliens suffering from physical defects which might affect their ability to earn a living. In all of those cases protests were filed by the carrier and fines were imposed under a procedure in all respects similar to that followed in the case at bar. All of the fines imposed were sustained except that as to the alien Fusco, who was found to be afflicted with tuberculosis. Two of the twelve fines sustained by the court upon the record before the Secretary had been imposed by that official in cases where the aliens had been examined abroad but were found upon arrival in the United States to be afflicted with tuberculosis. But the case of Fusco was reversed on the peculiar facts disclosed which consisted of, first, the certificate of the examining physicians and surgeons at the port of embarkation; second, an affidavit of one of the examining surgeons setting forth the details as to the nature, extent, and character of the medical examination made and giving reasons why, in the opinion of such surgeon, the disease was not then discovered and why it might have been detected upon arrival in the United States when it was not detectable by a competent medical examination at the time of embarkation; third, the written protest of the steamship company; and, fourth, the certificate of the U. S. Public Health surgeons to the effect that upon arrival Fusco was "found to be afflicted with tuberculosis, pulmonary, chronic, which is not easily curable" and that, in their opinion, the condition certified to "might have been detected by competent medical examination at the foreign port of embarkation." It should be noted that in the case of Fusco the U. S. physicians did not find that the disease was *active* or *far advanced* as they did in the cases of Larsson and Anderson.

In the case at bar, neither the Secretary of Labor nor this court has such a record. On the contrary, plaintiff simply submitted with its protests unsworn certificates of

the two physicians who had examined Larsson and the certificate of the physician who had examined Anderson. These certificates stated merely that these aliens had been examined and that such examinations did not indicate a disease of the lungs. No facts as to the nature or the extent of the examinations were presented. In the case of Larsson the certificate disclosed that at the time of examination he was coughing blood and that blood was coming from his nose, and that, in addition, this alien at the time of the examination at port of embarkation had a slight temperature. The certificate in the case of Anderson simply stated that he was examined on July 23, 1926, and that "no symptoms of tuberculosis could then be found." Unlike the certificate in the case of Fusco in *Lloyd Sabaudo Societa Per Aziono* v. *Elting*, *supra*, the certificate of the U. S. Public Health surgeons in the case at bar set forth in the case of Larsson that he was afflicted with "tuberculosis, pulmonary, chronic, *active*, which is not easily curable" and in the case of Anderson that he was afflicted with "tuberculosis, pulmonary, chronic, *far advanced*, which is not easily curable." There is no claim or showing in this case that the disease with which the aliens were found to be afflicted was not active and far advanced upon their arrival in the United States and there is no evidence attending to show that such disease might have become active or far advanced during the period of less than a month after the first examinations and on a voyage lasting about ten days.

The record discloses that the Secretary of Labor considered the protests and the certificates submitted therewith by plaintiff and gave his reasons for the conclusions that the fines should be imposed in the light of the facts disclosed in the medical certificates of the U. S. Public Health surgeons and the record of the proceeding before the board of inquiry. There was before the Secretary sufficient evidence to support his decision. The certificates which plaintiff filed with the Secretary in connection with its protests contained no facts which might reasonably have been expected would affect the findings of the physicians at Ellis Island. The Secretary had more detailed information with respect to the examinations at Ellis Island than he had with

respect to the examinations at the port of embarkation, and it was not and is not denied by plaintiff that the aliens were, upon arrival, afflicted with tuberculosis, active and far advanced. In such circumstances we think that his failure to submit the certificates of the examining physicians at the port of embarkation to the U. S. Public Health surgeons did not render his decisions arbitrary and unfair.

In view of our conclusion that plaintiff is not entitled to recover, it is unnecessary to discuss the claim of the defendant that the fines were voluntarily paid and may not, therefore, be recovered.

The petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## CEPHAS A. McCALIB, ADMINISTRATOR OF THE ESTATE OF DAVID C. McCALIB, DECEASED, v. THE UNITED STATES

[No. 43041. Decided April 6, 1936]

*On Demurrer to Petition*

*Claim for services rendered and expenses incurred for Mississippi Choctaw Indians; remedy for injury from Government's failure to perform duty.*—The existence of a remedy for injury occasioned by failure of the Government to recognize a governmental duty is exclusively dependent upon legislative discretion, and the courts may not intervene save by authority from Congress.

*Liability of Government on Indian contracts with citizens.*—While the Government's relationship to tribal Indians is held by the courts to resemble that of a guardian to his ward, and treaties and acts of Congress involving Indian tribes are, in case of doubt, uniformly construed in favor of the tribe, the courts have not gone so far as to hold, in the absence of treaty or statutory obligation, that the Government, because of such relationship to the Indians, is liable for payment of money under contracts between individual Indians and persons engaged to represent them.

*Same.*—Individual citizens dealing with an Indian Tribe or with its individual members do so with knowledge of the Indian rela-

tionship to the Government, and in the absence of treaty or statutory obligation the Government is not liable for indebtedness incurred either by the tribe or by its members.

*Assumption of liability by Congress; effect on subsequent claim.*—The fact that Congress had theretofore in particular cases assumed liability of a character similar to that involved in the suit at bar, and contended for by the plaintiff, not only does not support the plaintiff's contention for such liability where there has been no such assumption of liability by Congress, but emphasizes the fact that such action by Congress is an indispensable prerequisite to liability on the part of the Government.

*Source of governmental liability.*—A review of cases involving tribal Indians discloses that governmental liability for acts of the Government in the conduct of Indian affairs arises only from acts of Congress or treaties with the tribe.

*The Reporter's* statement of the case.

*Mr. William E. Richardson* for the plaintiff. *Messrs. Charles J. Kappler* and *Ward B. McCarthy* were on the brief.

*Mr. Charles H. Small*, with whom was *Mr. Assistant Attorney General Harry W. Blair*, for the defendant. *Mr. George T. Stormont* was on the brief.

The facts sufficiently appear from the court's opinion.

BOOTH, *Chief Justice*, delivered the opinion of the court:

A special jurisdictional act confers jurisdiction upon this court to adjudicate and determine the issues in this case. Plaintiff's petition was timely filed under the act and defendant has filed a demurrer thereto. The jurisdictional act provides in part as follows:

> That nothing herein contained shall be construed to create any obligation not heretofore existing in law or equity against the United States in its governmental capacity or as trustee for the individual Indians receiving the benefit of such services and/or expenses: *Provided, further*, That the jurisdiction hereby conferred shall be limited to claims for services rendered and expenses incurred on behalf only of such Indian or Indians as were enrolled as citizens of the Choctaw Nation under the provisions of the Choctaw-Chickasaw supplemental agreement approved by the Act of July 1, 1902, and ratified by the Choctaws and Chickasaws on

September 25, 1902 (32 Stat. 641, 651–652), and the provisions of this Act shall not be construed as authorizing the consideration or adjudication of any claim for services rendered and expenses incurred on behalf of any person not so enrolled (48 Stat. 1467).

The pertinent allegations of the petition begin with a statement embracing the controversy over the right of Mississippi Choctaw Indians to be enrolled upon the rolls of the Choctaw Nation and thereby acquire equal rights with the members of the Choctaw Nation in the common property of the same. The above controversy originated from Article XIV of the treaty of September 27, 1830 (7 Stat. 333), which provided that those members of the Choctaw tribe who remained in Mississippi after the tribe removed to the West "shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

A considerable number of Choctaws remained in Mississippi and were entitled to remain under provisions of the treaty of 1830. Opposition to the enrollment of Mississippi Choctaws on the rolls of the Choctaw Nation did not become an issue until, as the petition states, the United States determined upon the policy of allotting and distributing in severalty to the Choctaws of Oklahoma their landed and personal estate. The act of July 1, 1902 (32 Stat. 641), granted the right to Mississippi Choctaws to become enrolled members of the Choctaw Nation in the West upon certain conditions, among them the following as disclosed by Paragraphs 41 and 42 of the statute:

41. All persons duly identified by the Commission to the Five Civilized Tribes under the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stat. 495), as Mississippi Choctaws entitled to benefits under article 14 of the treaty between the United States and the Choctaw Nation concluded September 27, 1830, may, at any time within six months after the date of their identification as Mississippi Choctaws by the said Commission, make bona fide settlement within the Choctaw-Chickasaw country, and upon proof of such settlement to such Commission within one year after the date of their said identification as Mississippi Choctaws shall be enrolled by such Commission as Mis-

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sissippi Choctaws entitled to allotment as herein provided for citizens of the tribe, subject to the special provisions herein provided as to Mississippi Choctaws, and said enrollment shall be final when approved by the Secretary of the Interior. The application of no person for identification as a Mississippi Choctaw shall be received by said Commission after six months subsequent to the date of the final ratification of this agreement * * * all of said Mississippi Choctaws so enrolled by said Commission shall be upon a separate roll.

42. When any such Mississippi Choctaw shall have in good faith continuously resided upon the lands of the Choctaw and Chickasaw nations for a period of three years, including his residence thereon before and after such enrollment, he shall, upon due proof of such continuous, bona fide residence, made in such manner and before such officer as may be designated by the Secretary of the Interior, receive a patent for his allotment, as provided in the Atoka agreement, and he shall hold the lands allotted to him as provided in this agreement for citizens of the Choctaw and Chickasaw nations.

The removal and continuous residence conditions of the act of 1902, coupled with the necessity of sufficient proof to warrant identification of a Mississippi Choctaw, brought about the employment of persons to represent them and secure their rights under the statutes enacted for their benefit. The petition alleges that the Mississippi Choctaws were poor, many of them illiterate, unable to speak English, and incapable of removing of their own accord to the West and thereby meeting the conditions for enrollment.

The petition further alleges that at the time of required removal the valuable lands in the Choctaw Nation West were legally held by the owners of improvements made thereon, and for a Mississippi Choctaw to obtain an allotment of any of said lands it was necessary for the allottee to purchase the improvements of the owner of the same, and in consequence of their impoverished condition it was well known to the United States that Mississippi Choctaw applicants were unable to acquire the benefit of the act of 1902 without the assistance of the United States, an assistance which the United States had always given tribal

Indians, and the failure to provide for the expenses incident to removal and residence on the lands, when provided by a third party, creates an implied obligation upon the part of the United States to reimburse said party for sums expended.

Plaintiff's decedent, David C. McCalib, lived in the Choctaw Nation from 1903 to 1907. W. H. Gallaspy was a resident of Mississippi and it was he who brought to Oklahoma eighty-seven (87) Mississippi Choctaw Indians, comprising thirteen families, clients of Gallaspy under individual contracts to represent them before the Dawes Commission in Mississippi in their efforts to be identified and enrolled upon the Choctaw Nation rolls. Gallaspy's contracts of employment were taken upon a contingent fee basis, with the added consideration of reimbursement for expenses incurred.

Gallaspy, the petition states, for the first time became aware that the Mississippi Indians he had transported to Oklahoma could not make selections of allotments upon improved lands without first purchasing the improvements thereon, and could not procure a patent to an allotment until after a continuous residence thereon for three years, when he arrived with his clients in Oklahoma. These conditions, coupled with the Indians' financial status, presented to Gallaspy and the Indians the necessity of Gallaspy's returning them to Mississippi or concluding some arrangements for their remaining in Oklahoma and not losing the rights granted by the act of 1902.

Gallaspy, it is said, "made an arrangement" with McCalib to take over Gallaspy's obligations to the Indians, McCalib to pay Gallaspy $8,000 for service rendered and expenses incurred, McCalib thereafter to proceed under Gallaspy's contracts as assignee of the same, a transaction completed by the parties in every respect. McCalib paid Gallaspy the $8,000 and received a complete assignment of the contracts mentioned.

McCalib, it is alleged, secured allotments for said Indians, furnished supplies, stock, equipment, and maintained and cared for them for three years which enabled them to receive a patent for their lands, and it is also alleged that

they are now enjoying all the privileges of citizenship in the Choctaw Nation, an individual right of at least the appraised value of $8,500.

Plaintiff seeks a judgment for the total sum of $68,451.89—$30,000 value of services rendered, $8,000 reimbursement for sum paid by McCalib to Gallaspy, and $30,451.89, money actually expended in caring for and maintaining the Indians until allotted and thereafter until patents to their allotments were granted.

The language of the special jurisdictional act is significant. The United States does not waive any defenses to the cause of action; on the contrary, it expressly reserves the same. The plaintiff does not argue to the contrary. Therefore, the issue narrows to the single question, i. e., Is the United States liable under the facts alleged because of the usual common law liability governing the relationship of a guardian and ward?

The plaintiff asserts that the United States has consistently recognized as a governmental duty its obligation to bear the expense of the removal of tribal Indians from the East to the West. Early Indian treaties involving the removal of a tribe of Indians did provide for the payment of the expense of so doing. This obligation was assumed as a part of the consideration for the surrender to the United States of valuable Indian lands by the tribe. It was manifestly a fair and just one; whether it was induced wholly from a sense of duty or included within the scope of a governmental policy to procure the removal of the tribe from the East to the West, likewise regarded as a governmental duty, is difficult of ascertainment.

However, we do not have that particular question here. What confronts the court is granting *arguendo* the existence of the governmental duty claimed, may a third party intervene, discharge that duty, and recover from the Government the expense incurred in performing a duty the Government should have performed? The plaintiff frankly concedes in the brief "that claims may not be predicated upon defaults of the United States in the exercise of a governmental function." We think the existence of a remedy for failure to recognize a governmental duty which occasions injury is exclusively dependent upon legislative dis-

cretion, and no court may intervene save by an act of Congress.

It is true, as evidenced by repeated decisions of the Supreme Court—familiar ones—that the relationship of the United States to tribal Indians has been held to resemble that of a guardian to his ward. In the construction of Indian treaties and acts of Congress involving Indian tribes, and the disparity between the parties due to difference in intellectual attainments, as well as financial status and dependency upon the Government, the courts have uniformly resolved all doubts in favor of the tribe, but we are cited no decision, and none, we think, exists which extends to the limit of holding that in the absence of a treaty or act of Congress the Government because of such relationship is liable for the payment of money under contracts made between individual Indians and a person engaged to represent them.

The Government's jurisdiction over Indian tribal affairs, including their landed and monetary estate, is plenary and exclusive. It is for Congress and Congress alone to determine how their lands shall be held or divided, and how their tribal Indian funds shall be apportioned among them. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, *Heckman* v. *United States*, 224 U. S. 413.

Individual citizens dealing with an Indian tribe or members of the same do so with full knowledge of the relationship of the tribe and the Government, and it is clear, we think, beyond the peradventure of a doubt, that in no instance is the Government liable for any indebtedness incurred by either the tribe or members of the same unless by a treaty or act of Congress such a liability has been assumed. The fact that Congress has heretofore by legislation assumed liability of a character similar to the one in suit in no way fortifies plaintiff's position. On the contrary, it emphasizes the fact that an act of Congress is an indispensable prerequisite to the maintenance of the same.

The United States can not become liable upon a contract made by an individual Indian with a third party in the absence of granted authority to make such a contract. The Supreme Court had this precise question before it in the

case of *United States* v. *McDougall's Administrator*, 121 U. S. 89, 98, 101. With respect to this issue the court said:

> That Congress, by special acts, made provision for the payment of particular claims of the same class furnishes no ground whatever for the assumption that the government recognized its legal liability for the amount of such claims, much less for the amount of all other claims of like character. Such legislation may well furnish the basis for an appeal to the legislative department of the government to place all claimants, of the same class, upon an equality. But we are aware of no principle of law that would justify a court in treating the allowance by Congress of particular claims as a recognition by the Government of its liability upon every demand of like character in the hands of claimants. We may properly take judicial notice of the fact that many claims against the United States cannot be enforced by suit, the provision for which may, and upon grounds of equity and justice ought to be, made by special legislation. But the discretion which Congress has in such matters would be very seriously trammelled, if the doctrine should be established, that it cannot appropriate money to pay partciular claims, except at the risk of thereby recognizing the legal liability of the United States for the amount of other claims of the same general class. * * * That the policy pursued by Wozencraft and his colleagues was the only one that would have given peace to the inhabitants of California; that the Indians were induced by the promises of subsistence held out to them to abandon their lands to the whites, and settle upon reservations selected for them; and that the United States thereby acquired title to the lands so abandoned, are considerations to be addressed to Congress in support of a special appropriation to pay the claim of McDougall's administrator. They do not, in our judgment, establish or tend to establish a claim against the United States enforcible by suit.

If Congress intended to create a liability when the special jurisdictional act was passed, the necessity of referring the case to this court would not have existed. The special act reflects the fact that Congress referred to this court the legal issue as to whether either in law or equity an obligation to pay the amount sued for obtained, and the plaintiff's insistence is predicated upon what Congress has

heretofore done with respect to paying the expenses incurred in removing tribal Indians from the East to the West.

A review of cases involving tribal Indians discloses without exception that governmental liability for acts of the Government in the conduct of Indian affairs arises only from acts of Congress or treaties with the tribe. The special jurisdictional act in the *Winton case*, 51 C. Cls. 284, 296; 255 U. S. 373, unlike the act in this case, provided in part as follows:

> That the Court of Claims is hereby authorized and directed to hear, consider, and adjudicate the claims against the Mississippi Choctaws of the estate of Charles F. Winton, deceased, his associates and assigns, for services rendered and expenses incurred in the matter of the claim of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principle of *quantum meruit* in such amount or amounts as may appear equitable or justly due therefor, which judgment, if any, shall be paid from funds now or hereafter due such Choctaws by the United States.

The distinction between the two acts with respect to the court's jurisdiction thereunder is obvious. The act in the *Winton case* is a direct charge against Indian tribal funds. The act in this case creates no predetermined liability.

The plaintiff's contracts created individual obligations, and at the time they were entered into neither party to the same contemplated governmental liability to pay the prescribed fee. If the allottee received his share of land and funds, the plaintiff was to receive his compensation therefrom; if he failed of enrollment his representative was to receive no compensation at all, a speculative transaction embracing an assumed risk both with respect to realizing a fee and recovering the same in the event of his client's enrollment, made under the manifest impression that the parties thereto were or would become in all respects *sui juris*.

Congress on March 3, 1903 (32 Stat. 982, 997), enacted an act which reads in part as follows:

> That the sum of twenty thousand dollars, or so much thereof as is necessary, is hereby appropriated, to be

> immediately available, for the purpose of aiding indigent and identified full-blood Mississippi Choctaws to remove to the Indian Territory, to be expended at the discretion and under the direction of the Secretary of the Interior.

Subsequent to the passage of this act a controversy arose as to whether any portion of the sum appropriated could be used to subsist a Mississippi Choctaw after reaching Oklahoma. It was finally determined that the fund was available for such a purpose. A number of Mississippi Choctaws were removed by the Commission acting under this statute. We can not hold that the above appropriation, even if insufficient to accomplish its purpose, was made in response to a legal obligation to bear the expenses of removal and subsistence as claimed.

Congress by the enactment of laws gave to the Mississippi Choctaws the rights they obtained. The question of paying for the removal and subsistence of those who might obtain such rights was, like the creation of the rights, one for Congress and Congress alone. With the moral obligations incident to the transaction both parties concede we have nothing to do.

Defendant's demurrer is sustained and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

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## WILLIAM H. GRIFFIN v. THE UNITED STATES

[No. 43135. Decided April 6, 1936]

### *On the Proofs*

*Travel expenses of Government official; pullman car expenses.*—The provisions of section 10 of the Economy Act of March 3, 1933, limiting actual expenses for travel of Government officials to the "lowest first-class rate by the transportation facility used in such travel" apply to Pullman car accommodations, as well as to the cost of the railroad ticket, or transportation proper.

*Receipt for traveling expenses; proof of payment.*—Where a Government official fails to obtain receipts required by the Gov-

ernment Travel Regulations for his payment of travel expenses, or to establish such payment by competent evidence, he is not entitled to recover for such expenses.

*Per diem and traveling expenses; change of station, temporary or permanent.*—The plaintiff, an assistant counsel in the National Recovery Administration, on January 3, 1935, pursuant to what purported, and was understood, to be a temporary field assignment of an estimated duration of three months, proceeded from Washington, D. C., his permanent station, to San Francisco, California; and upon conclusion of his duties under such assignment returned to Washington, arriving March 7, 1935. *Held*, that such assignment was a temporary assignment, notwithstanding an office memorandum of February 7, 1935, in which plaintiff's name appeared as indicating his assignment as of February 4, 1935, to a permanent station at San Francisco but which was not communicated to him and never became effective, and that plaintiff was therefore entitled to *per diem* and incidental expense allowances during the period of his absence from Washington, and also to his travel expenses for the travel performed.

*The Reporter's* statement of the case:

*Mr. William H. Griffin*, attorney *pro se*, for the plaintiff.
*Mr. Paul A. Sweeney*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a resident and a citizen of the State of North Carolina, and of the United States. He is, and at all times since October 1933 has been, an employee of the United States. Between October 1933 and December 1935 he held an appointment as assistant counsel in the National Recovery Administration.

2. While so employed, in December 1933, the plaintiff, by direction of his superior, under a formal travel order issued by the National Recovery Administration, traveled on official business from Washington, D. C., to Portland, Oregon, and thence several days later to Seattle, Washington.

The travel order directed the plaintiff to proceed from Washington, D. C., to Seattle, Washington, and return to Washington, D. C. In the opinion of the plaintiff, the exigencies of the business required him to spend his entire time while he was traveling preparing the case which neces-

sitated this trip. For this purpose the National Recovery Administration furnished him with a requisition for a pullman section from Washington, D. C., to Portland, Oregon. At Chicago, neither a lower nor a section was available, and he was given a compartment at the price of a section for the trip from Chicago to Portland. The voucher setting forth these expenses with an explanatory note was approved by his superior officers. When the travel voucher was submitted to the Comptroller General, there was deducted therefrom the sum of $12.00, representing the excess cost between a through fare for a pullman lower berth from Washington, D. C., to Seattle, Washington, and the cost of a section from Washington, D. C., to Portland, Oregon, plus the cost of a pullman from Portland to Seattle.

3. In July 1934, the plaintiff, by direction of his superior officers, and under a formal travel order issued by the National Recovery Administration, traveled on official business from Jackson, Mississippi, to Yazoo City, Mississippi, and return; from Nashville, Tennessee, to Hohenwald; to Columbia, Tennessee, and return; from Nashville, Tennessee, to Cookeville, Tennessee, thence to Asheville, North Carolina. Had this travel been performed by train, the cost of such transportation would have been $18.88. The travel, however, was performed in the cars of personal friends, not related to the plaintiff, and in the course of such travel, the plaintiff stated that he expended sums in excess of $18.88 for oil, gas, and meals for the operators of the cars. For such expenditures the plaintiff obtained no receipts, as he did not then know that receipts of such nature were necessary. Afterwards it became impracticable in the opinion of the plaintiff to attempt to obtain such receipts. The travel so performed enabled the plaintiff to complete his work in two and one-half days' less time than would have been required had he performed such travel by rail. The plaintiff duly submitted his verified travel voucher, in which was included these items aggregating $18.88 for travel expenses. The voucher constituted the only evidence of this disbursement. This sum was on October 5, 1934, and again on June 19, 1935, disallowed by the Comptroller

General, on the grounds that no receipts were filed, and that the evidence of the expenditures was too indefinite.

4. On January 3, 1935, the plaintiff, by the direction of his superior officers, and under a formal travel order issued by the National Recovery Administration, and signed by Bradish J. Carroll, Jr., Administrative Assistant and Chief Clerk, traveled on official business to San Francisco, California, and was away from his designated post of duty in Washington, D. C., from January 3, 1935 to March 7, 1935. The travel order under which the plaintiff proceeded stated that the probable duration of his field assignment would be three months, after which he was to return to his permanent station at Washington, D. C., and that while he was in travel status, he would receive a per diem of $5.00. At the time of his departure for San Francisco, the plaintiff was advised by the Director of Enforcement, Mr. Phillip E. Buck, that his assignment to San Francisco was not intended to constitute a transfer of permanent station, and that he would be allowed the per diem of $5.00 during the entire period of his absence.

5. At the time the plaintiff was sent to San Francisco, California, a number of other attorneys were sent to various posts throughout the country for the purpose of completing the staffs of the various regional offices. These assignments were intended to be temporary at the time they were ordered. It was intended by the officials of the National Recovery Administration that these assignments would be permanent should the attorneys display an aptitude for that particular work. Under date of February 7, 1935, a memorandum was prepared by the Associate Counsel of the National Recovery Administration making definite assignments of some of these attorneys to be effective as of February 4, 1935. The name of the plaintiff appeared therein as assigned to a permanent station at San Francisco, California. This memorandum was not made public nor communicated to the attorneys involved, and it was not until March 18, 1935, when a general office memorandum was sent to all field personnel that a general statement of change of policy was made on the matter of temporary assignments. On that date, the plaintiff had completed his

assignment at San Francisco, and since March 7, 1935, had been in Washington, D. C.

**6.** The plaintiff, subsequent to his return from San Francisco, duly submitted a voucher for 59 days per diem amounting to $295.00, and $2.30 for incidental expenses. The Comptroller General disallowed the claim for per diem and the incidental expenses, holding that while the travel order of January 2, 1935, purported to constitute a temporary assignment, it was, in effect, a change of permanent station, and that the plaintiff was not entitled to per diem. The Comptroller General also held that the order transferring the plaintiff from Washington to San Francisco was not signed by the head of the department or administration, as required by Section 2 of the Act of March 15, 1934 (48 Stat. 450). He therefore ruled that the expenses of the trip from Washington, D. C., to San Francisco, California, and return, were incurred without authority of law, and that the United States should be reimbursed therefor. These expenses amounted to $236.79. The plaintiff has not reimbursed the United States for this sum. A voucher, including these expenses, was presented by the plaintiff under date of January 21, 1935, was thereafter approved as to such expenses by the National Recovery Administration, and submitted by it to the Comptroller General on or about February 13, 1935, and was approved by the Comptroller General on or about March 5, 1935. At that date the Comptroller General was not in possession of the facts recited in his memorandum decision of August 15, 1935, which held that the travel order of January 2 constituted change of permanent station and not an assignment to temporary duty.

**7.** The plaintiff is the sole owner of the claims for $12.00, $18.88, and $297.30, and no assignment or transfer of any part thereof has been made. No payment has been received by the plaintiff of these sums or any part thereof.

The court decided that plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, at all times material to the issues in this case, was an assistant counsel in the National Recovery

Administration. By direction of his superior officers, and under formal travel orders issued by them, he traveled extensively in the performance of his official duties during the period here involved. He sues to recover $328.18, alleged to be due him on account of unrefunded traveling expenses and unpaid per diem allowances. The claim consists of three items which will be considered in the order in which they are set forth in the petition.

1. In December 1933, the plaintiff traveled on official business from Washington, D. C., to Portland, Oregon, and thence a few days later to Seattle, Washington. The travel order signed by the Chief Clerk of the National Recovery Administration directed the plaintiff to proceed to Seattle, Washington and return to Washington, D. C. While the travel order itself did not so provide, the plaintiff was instructed to stop over at Portland, Oregon, and look after matters there before proceeding on to Seattle, which he did. The plaintiff, deeming the exigencies of the business required him to spend his entire time while traveling in preparation of the case which necessitated his trip, requested the National Recovery Administration to furnish him with a requisition for a pullman section from Washington, D. C., to Portland, Oregon. This was done, and the plaintiff occupied a section from Washington to Chicago. At Chicago neither a pullman lower berth nor a section was available and he was given a compartment from Chicago to Portland, at the cost of a section. He occupied a pullman lower berth from Portland to Seattle. When plaintiff's travel voucher was submitted to the Comptroller General there was deducted therefrom the sum of $12.00, which represented the excess cost between a through fare for a pullman lower berth from Washington, D. C., to Seattle, Washington, and the cost of a section from Washington, D. C., to Portland, Oregon, plus the cost of a pullman lower berth from Portland to Seattle.

Section 10 of the act of March 3, 1933 (47 Stat. 1516; Title 5, U. S. C., Sec. 73 (b), provides:

> Whenever by or under authority of law actual expenses for travel may be allowed to officers or employees of the United States, such allowances, in the case of

travel ordered after the date of enactment of this Act, shall not exceed the lowest first-class rate by the transportation facility used in such travel.

Paragraph 13 of the Standardized Government Travel Regulations effective July 1, 1931, governing travel by civilian personnel, provides that the following accommodations will be allowed on trains and steamers:

> (a) One standard lower berth for each person and first-class stateroom accommodations on steamers when same is not included in cost of passage ticket. * * *
>
> (c) A section, compartment, drawing room, or other superior railway or steamship accommodations will be allowed when the exigencies of travel require it. When not authorized in advance, a satisfactory explanation of the necessity for the use of such superior accommodations must accompany the expense account.

The plaintiff says that section 10 of the act of March 3, 1933, limiting actual expenses for travel to the "lowest first-class rate by the transportation facility used in such travel", has no application to Pullman accommodations but has reference only to allowable expenses in respect to the railroad ticket proper, leaving to persons traveling on official business the right to determine for themselves the type of sleeping accommodations or daytime working facilities they reasonably require. Manifestly this contention is without merit. Proper sleeping accommodations are a necessary part of the transportation facilities of a railroad, and the actual traveling expenses contemplated and referred to in the act of March 3, 1933, include the cost of such accommodations as well as the cost of the railroad ticket itself.

The intent and purpose of section 10 of the act of March 3, 1933 (The Economy Act), was to effect economies in the traveling expenses of government officials. It was all inclusive in its terms and provided that "such allowances" in the case of travel ordered after the effective date of the Act "shall not exceed the lowest first-class rate by the transportation facility used in such travel." The undoubted purpose of the provision was to discontinue the practice of furnishing superior accommodations to government officials traveling on railroads and steamers, as theretofore authorized

in certain cases by paragraph 13 (c) of the Travel Regulations. This is the construction the General Accounting Office has consistently given to the section, and we think it correct. See Comp. Gen. 13, 10.

Notwithstanding the exigencies of the situation, as viewed by the plaintiff or his superiors in the National Recovery Administration, the maximum travel allowances in respect to pullman accommodations on his trip from Washington to Seattle was the lowest rate of one standard lower berth. The Comptroller General quite properly deducted $12.00 from his travel pay voucher, the excess cost of a pullman section compared with that of a through lower berth. The plaintiff is, therefore, not entitled to recover on this item of the claim.

2. In July 1934 the plaintiff, under a travel order issued by the National Recovery Administration, traveled on official business from Jackson, Mississippi, to Yazoo, Mississippi, and return; from Nashville, Tennessee, to Hohenwald; to Columbia, Tennessee, and return; from Nashville, Tennessee, to Cookeville, Tennessee, thence to Asheville, North Carolina. This travel was performed in cars of personal friends, not related to the plaintiff, in the course of which, plaintiff stated in his travel pay voucher that he had expended sums in excess of $18.88 for oil, gas, and meals for the operators of the cars used. The plaintiff obtained no receipts for these expenditures, not knowing at the time that such receipts were required. It is stipulated that had this travel been performed by train the cost of such transportation would have been $18.88. It is further stipulated that the travel performed by the plaintiff in the manner stated enabled him to complete his work in two and one-half days' less time than would have been required had he performed such travel by rail.

Paragraph 80 of the Travel Regulations provides:

> Receipts, when practicable to obtain them, will be required for:
>
> (e) Hire of special conveyance such as livery, boat, automobile (not taxicabs locally), aircraft, etc., where the amount involved is in excess of $1.

The Comptroller General upon the audit of plaintiff's verified travel voucher disallowed the items aggregating $18.88, on the grounds that no receipts were filed with the voucher, and that the evidence of the expenditures was too indefinite. We think the Comptroller General was justified in disallowing payment of these items. The provisions of the Travel Regulations requiring receipts when practicable for expenditures incurred in the use of special conveyances, and it was obviously practicable in this case, are reasonable and necessary to the orderly disbursement of funds appropriated to pay traveling expenses of government officials.

The failure of the plaintiff to obtain receipts for payment of the traveling expenses claimed would not preclude his right to recover in this action if the actual payment of such expenses was otherwise established by competent proof. The plaintiff, however, has not furnished such proof. The claim for these expenditures comes before the court exactly as it was presented to the General Accounting Office and is supported only by the statements made by plaintiff in the travel voucher. Plaintiff's statements in the pay voucher that the train service to and from the points visited by him was inadequate, and that the method of travel used by him enabled him to complete his work in two and one-half days' less time than would have been required if travel had been performed by rail, and that the cost of the transportation by rail would have been $18.88, are entirely immaterial and in no way establish, or even tend to establish, the amount actually and necessarily disbursed by him in connection with such travels. He is not entitled to recover on this item of the claim.

3. On January 2, 1935, the plaintiff was directed by his superior officers to proceed to San Francisco, California, on official business. The travel order directed plaintiff to proceed from Washington, D. C. to San Francisco or any side trips that might be necessary while on such assignment. The order then stated—

> Upon the completion of your field assignment, the probable duration of which will be 3 months, you will return to your permanent station at Washington, D. C.

and that—

> While in travel status you will be allowed a per diem of $5.00 and incidental transportation expenses in accordance with the standardized Government Travel Regulations.

Under the directions and upon the authority of this travel order the plaintiff left Washington, D. C. on January 3, 1935, and traveled by rail to San Francisco, California, where he remained on official business in connection with the National Recovery Administration until March 1, 1935. Upon completion of his official duties at San Francisco he returned as directed in the travel order to Washington, D. C., and arrived there on March 7, 1935.

Subsequent to his return to Washington from San Francisco, plaintiff duly submitted his voucher for 59 days per diem covering the period of his absence from Washington, January 3, 1935 to March 7, 1935, amounting to $295.00, and $2.30 for incidental expenses. The Comptroller General disallowed the claim for per diem and incidental expenses holding that while the order of January 2, 1935 purported to constitute a temporary assignment, it was in effect a change of permanent station, and that the plaintiff was not entitled to the per diem claimed.

The sole issue as to this item of the claim is whether plaintiff's assignment to San Francisco was temporary in character or was a change of permanent station.

At the time the plaintiff was sent to San Francisco other attorneys in the National Recovery Administration were sent to various posts throughout the country for the purpose of completing the staffs of designated Regional Offices. These assignments were intended to be temporary at the time they were ordered, it being the intention, however, of officials of the National Recovery Administration that the assignments would be made permanent should the attorneys display an aptitude for that particular work. On February 7, 1935, an office memorandum was prepared by the Assistant Counsel of the National Recovery Administration making definite assignment of some of these attorneys to be effective as of February 4, 1935, and plain-

tiff's name appeared therein as assigned to a permanent station at San Francisco. This memorandum was not made public or communicated to any of the attorneys involved, including the plaintiff. Subsequently, on March 18, 1935, a general office memorandum was sent to all field personnel stating a change in policy was made in the matter of temporary assignments. The plaintiff on that date had completed his assignment in San Francisco and had returned to his permanent station in Washington.

The travel order of January 2, 1935, clearly shows that plaintiff's assignment to San Francisco was a temporary one and did not constitute a change of permanent station. The assignment was designated "your field assignment, the probable duration of which will be three months." The plaintiff was directed to "return to your permanent station in Washington" upon completion of the assignment. The parties have also stipulated that plaintiff accepted the assignment upon an express understanding with his superiors in the National Recovery Administration that the assignment was not intended to constitute a transfer of permanent station, and that he would be allowed the per diem of $5.00 during the period of his absence. The plaintiff was not notified of the office memorandum of February 7, 1935, and upon the completion of his work in San Francisco returned to Washington as directed in the travel order of January 2, 1935. If the office memorandum of February 7, 1935, effected a change in plaintiff's permanent station from Washington to San Francisco as contended, that place has continued to be and is now his permanent station, as no subsequent order was ever made transferring him from that place. He has, however, since his return from San Francisco been permanently stationed in Washington. The situation would be entirely different if the plaintiff had remained indefinitely in San Francisco following the office memorandum of February 7, 1935, or had he subsequently been transferred from that office to Washington as his permanent station. Notwithstanding the bungling and slipshod manner in which this matter was handled in the National Recovery Administration, it is clear that the travel

order under which plaintiff proceeded to San Francisco did not constitute a change of permanent station from Washington to San Francisco, nor was such change effected by the office memorandum of February 7, 1935.

The plaintiff is entitled to recover on this item of the claim.

COUNTERCLAIM

The defendant has interposed a counterclaim alleging that the plaintiff is indebted to the United States in the sum of $236.79. The counterclaim is predicated on the theory that the travel order of January 2, 1935, on which the plaintiff proceeded to San Francisco and return, was in effect a change of his permanent station and that since this order was not signed by the head of the department or administration as required by section 2 of the act of March 15, 1934 (48 Stat. 450), the traveling expenses incurred thereunder were without authority of law and should be refunded to the United States. The amount sought to be recovered on the counterclaim aggregates the traveling expenses of the plaintiff in making the trip from Washington to San Francisco and return, including incidentals, drayage, taxicab fares, etc., and per diem allowances from January 3, 1935, the date of plaintiff's departure from Washington, to January 7, 1935, the date of arrival in San Francisco.

The defendant concedes in the brief that if the travel order of January 2, 1935 was for temporary travel the counterclaim can not be maintained. The court having held that the order in question was for temporary travel, and that it did not constitute a change of permanent station, the counterclaim must be dismissed.

Judgment is awarded the plaintiff on the third item of his claim in the sum of $297.30. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Syllabus

# AMERICAN PROPELLER AND MANUFACTURING COMPANY, A CORPORATION, v. THE UNITED STATES

[No. B-28. Decided April 6, 1936. Amended findings of fact and new judgment, with memorandum opinion, October 5, 1936]

## *On the Proofs*

*Contracts for airplane propellers; cancelation of contracts; damage for breach; profit on plant enlargement.*—Where the contractor, for the purpose of expediting performance of World War contracts for production of war supplies, and at the suggestion and urging of the Government officer in charge, reasonably increased its plant and equipment in proportion to the supplies contracted for and ordered by the Government, and such contracts and orders were subsequently canceled by the Government, the contractor is entitled to recover damages sustained by reason of such cancelation, including loss from such enlargement of its plant and facilities for performance of contracts and orders then in hand, but not on account of anticipated future contracts or orders, and not including a profit upon the construction cost of such enlargement.

*Settlement agreement pursuant to cancelation of contracts; scope of agreement.*—A settlement agreement between the plaintiff and officers of the Government specifically covering only a part of the plaintiff's items of loss resulting from the Government's cancelation of its contracts, held not to conclude plaintiff as to other items of loss resulting from such cancelation.

*Income and profits tax; determination of Commissioner of Internal Revenue prima facie correct; burden of proof to show error.*— A final tax determination by the Commissioner of Internal Revenue is prima facie correct, and the burden of showing error and the correct determination rests upon the taxpayer alleging error; but corrections may be made in specific items where error therein is shown though the proof be insufficient for the calculation of the tax without using the Commissioner's computation as a basis.

*Inventory valuation, cost or market; invested capital.*—The taxpayer held entitled to use in its closing inventory for the year 1918 the market value of lumber and general supplies on hand, instead of the cost price of such materials, and also to include as invested capital 25 percent of the par value of its outstanding stock.

Reporter's Statement of the Case

*Interest on deficiency tax.*—The Government is entitled to interest on a deficiency tax for the year 1918, notwithstanding it was during the same time indebted to the taxpayer on obligations growing out of contracts but upon which it was not liable for interest.

*Interest on claim; application of contractor's claim on taxes due Government.*—An amount due a taxpayer by the Government on an unliquidated noninterest-bearing claim not relating to taxes may not be applied on overdue taxes due the Government so as to amount to the stopping of interest on such taxes or to the allowance of interest to the taxpayer on such claim.

*Penalty on unpaid taxes; demand for payment of tax.*—The penalty or interest of 1 percent per month, or 12 percent per annum, on an additional assessment, if imposed under the applicable statute, is imposed only after a demand for payment of the tax; and where demand is not shown by the record, it will not be presumed by the court.

*The Reporter's* statement of the case:

*Mr. J. Kemp Bartlett* for the plaintiff. *Williams, Myers & Quiggle* and *Bartlett, Poe & Claggett* were on the briefs.

*Mr. George H. Foster*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff was incorporated in 1915 and, during the times here involved, was a manufacturer of propellers for airplanes. Its business as such was founded upon certain patent rights in the construction and design of propellers for aircraft, assigned to it by the patentee, Spencer Heath, president of the company, who was a pioneer in the design and construction of airplane propellers.

Among the patentee's improvements was the construction of the two-bladed propeller with laminations divided at the hub and joined there by a long slanting joint. This enabled the inventor to match the blades one against the other, which was impossible with a continuous blade or lamination. This innovation in construction was a recognized improvement, superior to methods of construction involved in designs which the War Department was preparing at the inception of the contract periods herein involved.

2. On September 21, 1917, A. C. Downey, Captain, Signal Corps, United States Reserves, by direction of the Chief Signal Officer of the Army, gave plaintiff an order in writing, no. 20005, for "1,000 propellers, for Curtiss OX-5, engines, oak (to be tipped with copper and including box) as per specifications" (enumerating their serial numbers), at $87.65 each, total $87,650, deliveries to be 20 per day commencing September 10, 1917, contract no. 1750 to follow. This order was followed by a formal contract, by and between plaintiff and the said Downey, for and in behalf of the United States, September 25, 1917, numbered 1750, for the material described in order no. 20005 and at the price named therein. Copies of the contract and order are attached to the petition as exhibit no. 1 thereto, and made part of this finding by reference.

The propellers required by this order and contract were of the "training" type.

Plaintiff delivered directly to the Government upon its direction 900 of these propellers, the last shipment on March 20, 1918, and the nine hundred have been paid for. The balance of 100 were made and shipped at the appropriate stage of completion to the Copper Products Company, Boston, Massachusetts, for copper tipping by the process of electrolysis, plaintiff having been directed to do so by defendant's officers for the purpose of testing the process in use at the Copper Products Company's plant, which they thought might be an improvement over plaintiff's method of copper tipping. The propellers so shipped to the Copper Products Company were held by that company some months, until 99 were returned to the plaintiff, and rejected by the Government inspector solely on the ground that the work done by the Copper Products Company was unsatisfactory. These 99 propellers are still in the hands of plaintiff and have not been paid for. The remaining propeller was, by direction of defendant's officers, shipped by the Copper Products Company to the Curtiss Aeroplane Company for experimental purposes and plaintiff has not been paid therefor.

3. On October 4, 1917, Captain Downey, by direction of the Chief Signal Officer of the Army, again delivered to

plaintiff an order in writing, no. 20054 for "1,000 propellers, oak, to be tipped with copper, including box, for Curtiss OX-5 engine", and "1,000 propellers, oak, to be tipped with copper, including box, for Hall-Scott, A-7-A engine", all 2,000 propellers at $87.65 each, total $175,300, to be in accordance with enumerated specification numbers, delivery to be at the rate of 125 per month beginning November 1, 1917, on each set, 250 per month on all. This order was followed by a formal contract October 6, 1917, no. 1846, covering the terms of the order, by and between plaintiff and Captain Downey for and in behalf of the United States. Copies of the order and contract are attached to the petition as exhibit no. 2, and made part hereof by reference.

The propellers required by this order and contract were of the "training" type.

In the fulfillment of this order and contract plaintiff began using, with the approval of the War Department, preexisting designs, nos. 130 and 151, the design of the propeller being determined by the type of engine used. On February 8, 1918, plaintiff was instructed by the Department to substitute design no. 8-25, which was a Government design, on the propellers for the Hall-Scott A-7-A engine. February 12, 1918, this order was countermanded. On March 28, 1918, by wire, confirmed the following day by letter, the Department ordered the use of design 13706 on Hall-Scott A-7-A engines, and asked for the number of propellers that plaintiff would have to complete under the old design. The propellers in process under the old design could not in practice be altered to conform to the new design.

May 9, 1918, plaintiff was by telegram instructed by the Signal Office, War Department, to "cancel all incomplete shipping instructions on order twenty thousand fifty-four except instructions seventh covering twelve OX fives Langley."

May 13, 1918, E. T. Farley, 1st lieutenant, A. S., Sig. R. C., by direction of the Chief Signal Officer of the Army, wrote to plaintiff as follows:

> 1. With reference to Signal Corps Order No. 20054, you are advised that all uncompleted shipping instructions are hereby cancelled, with the following excep-

tion: Instructions issued under date of May 7, 1918, covering twelve propellers of the OX-5 type to Langley Field, Hampton, Va.

2. It is requested that you immediately furnish this office with a list showing all propellers shipped, giving consignees, dates of shipments, and quantities shipped, together with the unshipped balances.

At or about this time defendant's officers instructed plaintiff to suspend operations on all training propellers for four months as the output was exceeding their requirements.

On Order No. 20054, Contract No. 1846, plaintiff delivered to defendant 906 propellers. Of the 906 propellers delivered 820 were accepted and paid for by the defendant. Plaintiff endeavored to obtain shipping instructions for the balance of 1,094 propellers under this contract, and shipping instructions were refused by the defendant's officers. The balance of 1,094 have not been paid for. Shipping instructions were refused because airplanes for training purposes were not being manufactured rapidly enough to absorb the output of training propellers and training propellers were being accumulated faster than they could be used. The balance of 1,094 propellers are now on hand at plaintiff's plant.

4. In the fall of the year 1917, plaintiff's plant was located in Baltimore, Maryland, and was entirely in leased buildings. In or about September 1917, plaintiff began the erection of a plant in Baltimore on the Key Highway. This plant will hereinafter be termed the Key Highway Plant.

In December 1917 the Key Highway Plant was nearing completion. It consisted of one story with basement one-quarter of the area thereunder, the main floor area being 30,000 square feet. It was built of concrete with walls principally of glass, concrete pilasters being in between the sash, and the roof was provided with numerous openings for sky light. Its structure was such that it would support another story. Building a one-story factory building sufficiently strong to support additional stories was sound practice and not unusual.

5. Toward the last of December 1917, and when the Key Highway Plant was structurally about completed, Edward L. Ryerson, Jr., lieutenant, Signal Corps, head of the Propeller Section, Equipment Division, Office of the Chief Sig-

nal Officer, War Department, and charged with arrangements for the production and procurement of propellers for the Air Service, including negotiations for the procurement of lumber used in connection with the manufacture thereof, visited the Key Highway Plant for the purpose of informing himself as to plaintiff's facilities for the manufacture of propellers.

At Lt. Ryerson's request plaintiff's president, Spencer Heath, conducted him over the plant. Lt. Ryerson expressed himself as pleased with the general appearance of the place, but said that it was not of sufficient capacity to manufacture the number of propellers the War Department would order from the company, and inquired if another story could be added. Upon being told that it could and that the skylight openings could be closed up, making a satisfactory floor out of the roof, Lt. Ryerson urged Heath to make the addition, to devote the entire floor space of the two stories to operations and provide the necessary office space separately therefrom. After some argument, Heath, insisting that the company would have to be given sufficient Government business to justify the additional space, and Lt. Ryerson, insisting that such business would be forthcoming, promised Lt. Ryerson to make the addition and immediately arranged with the contractor who had already erected the basement and first floor to add another story, necessary elevators, and extra office space.

Plaintiff completed the erection of the Key Highway Plant, including the addition, in the summer of 1918, and moved into it about August 1, 1918.

While the additional construction was going on and until the work was well in progress Lt. Ryerson kept in frequent personal contact with Heath asking to be informed as to the state of the work.

6. The Key Highway Plant, as thus enlarged, required machinery and equipment in excess of that appropriate to the building as first constructed. This included elevators, a battery of upright boilers, additional kilns for the drying of lumber, and machinery in about twice the amount needed for a one-story building.

The original plant was equipped with eight masonry kilns of the box type, and when the floor space was doubled plaintiff installed eight additional kilns of curtain type on top of the other kilns. In order to dry the lumber furnished by the Government, as hereinafter related, Lt. Ryerson, upon plaintiff's representation that it was necessary to make provision to dry the lumber then being shipped to it by the Government, endeavored to procure additional kiln facilities outside plaintiff's premises. He was unable to do so and insisted upon plaintiff's adding to its facilities sufficient kilns to take care of the lumber that was then being delivered, or would be delivered, to plaintiff by the Government for the manufacture of airplane propellers. Heath objected that his outlay was already considerable and that there was a limit beyond which he could not be expected to go. Lt. Ryerson continued to urge upon Heath the necessity of additional kiln facilities and told him that it would be necessary to provide adequate dry kiln capacity in order to dry kiln the lumber, that Cutler curtain kilns had been approved by the inspection department, and that he had better go ahead and provide them.

Plaintiff thereupon erected 12 Cutler curtain kilns adjacent to the other 16 kilns at the Key Highway Plant, under the direction of a kiln expert attached to the War Department, and they were operated at all times under this expert's control and direction.

7. February 8, 1918, Lt. Ryerson, by direction of the Chief Signal Officer, advised plaintiff by letter as follows:

> Subject: Mahogany.
>
> 1. In connection with the supply of mahogany lumber we have arranged for the purchase of 152,000 feet of Central American mahogany from the Otis Manufacturing Company of New Orleans, material to be propeller stock 8″ and up in width, not over 5% to be under 9″ and 8′ and up in length firsts, seconds, and selects, not more than 25% selects. This material is being bought by the Signal Corps at $270.00 per thousand, f. o. b. New Orleans, for material 8″ to 17″ in width and $300.00 per thousand, f. o. b. New Orleans, for material 17″ in width and over.

2. Material is ready for immediate delivery and I expect to wire instructions to load for delivery to your plant at Baltimore for use in production of additional combat propellers.

3. It would be desirable to have this material purchased outright by you from the Signal Corps and make your quotations accordingly. We believe this material will be very desirable stock for the manufacture of propellers on account of the large percentage of wider widths.

4. We have also purchased some 40,000 feet of wide stock, 18″ and up, from Lewis, Thompson & Company, New York City, at a price of $320.00 per thousand, f. o. b. Astoria, Long Island. We desire to apply this material as well on your orders.

5. Kindly advise us at once as to your suggestions for handling this matter, incorporating your order for the material, if same is in full accord with your understanding as to the best method of handling the matter.

At the time this letter was written and theretofore plaintiff had provided itself with lumber necessary for its pending orders from the open market, and had no contracts or orders from the Government upon which the mahogany lumber referred to could be applied. The mahogany lumber therein mentioned referred solely to orders or contracts for propellers which the War Department intended to give the plaintiff. In 1918 and up to the time of the armistice, mahogany and walnut lumber were under control of the Government. February 15, 1918, plaintiff was advised by wire as follows: "Do not negotiate for purchase of walnut propeller stock. Signal Corps buying all walnut and will take care of all your requirements. Signal Equipment Thirty One." At the time this telegram was transmitted plaintiff had no orders or contracts from the Signal Corps requiring the use of walnut lumber, and the telegram referred solely to future orders or contracts for propellers which the War Department contemplated giving the plaintiff.

Thereafter from time to time the War Department caused to be delivered to plaintiff shipments of walnut and mahogany lumber. June 4, 1918, the Signal Corps in writing required plaintiff to have on hand at all times 150,000 to

200,000 feet of black walnut lumber, to be used on rush orders for propellers from the Signal Corps. All lumber furnished by the Signal Corps came to plaintiff in a green state, requiring from 30 to 60 days to dry out in plaintiff's kilns before it could be manipulated.

Up to June 14, 1918, defendant had caused to be delivered to plaintiff for the manufacture of airplane propellers 774,-000 feet of walnut and mahogany lumber without prior requisition therefor from plaintiff. This lumber was not needed for contracts existing at the time of delivery. All other deliveries of lumber by the Government were on requisitions by the plaintiff. The prices of said 774,000 feet and all requisitioned lumber were determined by the Government and not by plaintiff.

The Government at no time made deliveries to plaintiff of oak lumber.

8. Following negotiations in January 1918, F. D. Schnacke, 1st lieutenant, Sig., R. C. A. S., by direction of the Chief Signal Officer of the Army, gave plaintiff, February 11, 1918, a written order, no. 30619, for 60 propellers for U. S. 12 engines, as per specifications, of mahogany or walnut, at $184 each, total $11,040, including box, 30 to be ready for delivery January 31, 1918, the remainder February 15, 1918. This was followed by a formal contract, no. 2907, February 15, 1918, embodying the order, by and between plaintiff and Lt. Schnacke for and in behalf of the United States.

These propellers were delivered and paid for. They were of the type known as "combat" propellers. The material therefor was procured by plaintiff in the open market.

9. In the latter part of February 1918, Lt. Ryerson gave plaintiff a verbal order for 750 combat propellers of plaintiff's design, to be made from plaintiff's stock, and delivered in March 1918. A few days thereafter Lt. Ryerson verbally increased the order to 1,000 propellers. March 13, 1918, he instructed plaintiff by wire to discontinue work on this order and asked if it could substitute at once Hispano propellers, to be of oak, no copper tips, in accordance with drawing then being sent to plaintiff, and what was the earliest date delivery could commence. March 14, 1918, Lt. Ryerson, by direc-

tion of the Chief Signal Officer, confirmed the order for 750 combat propellers by letter as follows:

1. We find that we have never confirmed our understanding with you that you were to proceed with the gluing up of blocks for use on combat propellers as per arrangements made with Lieutenant Ryerson.

2. This agreement incorporated the use of wideners and splices where necessary in the construction of these blocks for combat propellers. It was understood that mahogany or oak would be used, mahogany being given the preference and used as far as possible with the stock available.

3. The arrangement was made with the understanding that you were to produce 750 combat propellers in March, provided final information with regard to pitch and design could be obtained in sufficient time to permit the finishing of these blocks within the time specified.

4. It was originally understood that these blocks would be built up so as to be finished in accordance with your own dynopter type design as per sample being sent to Dayton for tests. It was later agreed that the blocks would be so changed as to permit the finishing of propellers up to 10′ diameter and with pitch and other dimensions to be determined by later tests, provided such dimensions could be applied in the construction of these blocks.

5. You will furnish us, upon receipt of this, an accurate statement of the status of this matter, indicating the number of blocks in process, the number that can be applied on 10′ diameter blades as well as the number that must be applied on blades of the dynopter type design.

6. It is understood that this procedure was adopted as an emergency measure, in order to make possible the production of combat propellers with as great rapidity as possible in spite of the fact that no approved design could be furnished for the execution of a contract in a regular manner.

7. It was understood that as soon as tests could be made to determine the proper pitch and design that could be applied on these blocks that negotiations would be entered into for the purchase of a number of completed propellers represented by the blocks which you have constructed for this purpose.

There was no confirmation of the verbal increase to 1,000 propellers.

On March 13, 1918, plaintiff had in process some 400 of the 750 propellers so ordered, of which 184 (hereinafter referred to) were in the last stages of completion, 172 thereof being glued and 12 not glued, the balance of the material being thereafter diverted to other work. The lumber used in their construction was of quartered white oak.

Plaintiff discontinued work on the combat propellers as instructed in the telegram of March 13, 1918, and has not been paid by the defendant for any of the labor or material used in the performance of the foregoing order.

The 184 propellers brought to the last stages of completion are still in storage at plaintiff's plant and have not been paid for.

**10.** On March 22, 1918, Lt. Schnacke, by direction of the Chief Signal Officer of the Army, gave plaintiff an order in writing, no. 20858, for 300 propellers for Hispano Suiza engines, in accordance with specifications, to be made of quartered white oak, birch or cherry, at $110 each, without copper tips, but with individual boxes for shipment, total $33,000, delivery to begin immediately, to be completed on or before April 15, 1918. Contract no. 3348, dated March 25, 1918, embodying this order, followed, by and between plaintiff and Lt. Schnacke for and in behalf of the United States.

These propellers were known as "training" propellers.

The order was given to plaintiff on representations by defendant's officer that it was an emergency order and would have to take precedence over all other work. Plaintiff gave it precedence and completed delivery of the propellers on or about April 15, 1918, and received the contract price therefor.

**11.** On March 22, 1918, Lt. Schnacke, by direction of the Chief Signal Officer of the Army, placed with plaintiff a written order, no. 20859, for 100 propellers, oak copper tipped, for Curtiss, V-2, type 3, on R-4 airplanes, at $127 each, total $12,700, to be in accordance with Signal Corps specifications, delivery to begin April 1, 1918, and the entire order to be completed by May 1, 1918. This was followed March 25, 1918, by a formal contract, no. 3347, embodying the previous order, by and between plaintiff and the said Lt.

Schnacke for and in behalf of the United States. Copies of this order and contract are attached to the petition as exhibit no. 3, and are made part hereof by reference.

These propellers were of the "training" type. Of the number contracted for, 90 were delivered, accepted and paid for.

12. On March 23, 1918, Lt. Schnacke, by direction of the Chief Signal Officer of the Army, gave plaintiff a written order, no. 20860, for 500 propellers for Curtiss OX-5 engines, to be of oak and copper tipped and in accordance with Signal Corps specifications, at $76 each, total $38,000, to be ready for inspection six weeks after receipt of order. This was followed by a formal contract March 25, 1918, no. 3349, embodying the previous order, by and between plaintiff and Lt. Schnacke for and in behalf of the United States. Copies of the order and contract are attached to the petition as exhibit no. 4 and made part hereof by reference.

These propellers were of the "training" type. Of the number contracted for, 379 were delivered.

13. May 14, 1918, Lt. Schnacke, by direction of the Chief Signal Officer of the Army, placed with plaintiff a written order no. 21128 for 3,000 propellers for U. S. 12 engines, without tips, of walnut, in accordance with Signal Corps specifications and the Charavay design, at $100 each, total $300,000. Deliveries were to begin June 15, 1918, and continue at the rate of 40 propellers a day, the order to be completed by September 15, 1918. This order was followed by a formal contract May 16, 1918, no. 3870, embodying the previous order, between plaintiff and Lt. Schnacke for and in behalf of the United States. Copies of the order and contract are attached to the petition as exhibit no. 5 and are made part hereof by reference.

These were known as "combat" propellers.

June 25, 1918, plaintiff had completed 47 of these propellers.

On July 18, 1918, plaintiff, on receipt from the War Department of instructions to do so, shipped to the Dayton Wright Aeroplane Company 102 propellers to apply on contract no. 3870, order no. 21128. This shipment was accepted and paid for and as to it there is no controversy.

In the summer of 1918 and while plaintiff was engaged in the performance of contract no. 3870, order no. 21128, the War Department decided to abandon the Charavay design and did abandon it in August 1918, and pursuant to such decision plaintiff was on August 2, 1918, directed in writing by the Bureau of Aircraft Production, War Department, "to stop all gluing operations on order no. 21128 until further instructions." The number of propellers of the Charavay design in process August 2, 1918, was 871. Captain (formerly lieutenant) Schnacke on August 19, 1918, by direction of the Director of Aircraft Production, increased the price on contract no. 3870, order no. 21128, by $6,000, to cover certain extra wrapping and packing at $2 per propeller.

There were delivered to and accepted by defendant, on or about August 23, 1918, 102 propellers of the Charavay design on this contract, which have not been paid for, made, packed, and delivered at the price of $100 per propeller, amounting to $10,200. August 30, 1918, the Director of Military Aeronautics, through the Aviation Officer, Expedition Depot, Baltimore, Md., in writing asked of plaintiff shipping instructions for their return. No reason was assigned for returning them. Plaintiff did not furnish shipping instructions and they have not been returned to plaintiff.

The Bureau of Aircraft Production by telegram August 26, 1918, directed plaintiff to "hold all production on order twenty-one one twenty-eight."

The propellers of the Charavay design in process and not completed by plaintiff at the time of abandonment of the design could not be adapted to designs substituted by the War Department and had to be scrapped.

August 26, 1918, plaintiff in writing protested to the Director of Aircraft Production that due to interference on the part of his officers the company was unable to proceed with performance of Contract No. 3870, Order No. 21128, and asked for an investigation and relief. September 2, 1918, plaintiff in writing demanded of the Acting Director of Aircraft Production "payment for work performed and suitable compensation for losses and damages sustained" on Order No. 21128, Contract No. 3870.

**14.** July 13, 1918, O. R. Ewing, Capt. A. S. (P) N. A., acting by direction of the Director of the Bureau of Air-

craft Production, placed with plaintiff an order in writing, No. 740026, for 2,000 constant speed regulating air fans, as per sample, at $29.38 each, total $58,760, to be delivered at the rate of 100 per week after 30 days, and 200 fans per week in 60 days, after date of receipt of order, 35 to be delivered within 30 days after date of receipt of order. Contract No. 4301 followed and embraced this order, was dated October 16, 1918, and was entered into between plaintiff and Capt. Schnacke, representing the United States.

December 6, 1918, Capt. Schnacke, acting by direction of the acting Director of Aircraft Production, wrote plaintiff in respect to Order No. 740026 as follows: "You are hereby instructed to stop all production under this order, and incur no further expense in connection therewith."

December 19, 1918, a settlement contract, No. 4301–A, was entered into between plaintiff and defendant, terminating the original contract, and providing for the delivery of 100 air fans thereunder in addition to those already delivered, and no more, and for the payment to plaintiff by the United States of $38,758.43 upon the delivery of the 100 air fans, as full and final compensation under the original and settlement contracts.

Delivery of the air fans called for by the settlement contract was made to the defendant on or about December 28, 1918, bill for the sum of $38,758.43 presented by plaintiff, and payment refused, and no part thereof has been paid by the defendant.

15. On August 26, 1918, Capt. Schnacke, by direction of the Director of Aircraft Production, gave plaintiff a written order No. 720376, for 184 propellers for D H 4 planes with U. S. 12 engines, to be manufactured from quartered white oak, or from mahogany, according to specifications, at $150 per propeller, including individual boxes for shipment, total $27,600, delivery to be completed by October 1, 1918, Contract No. 4578 to follow. This order related to the 184 propellers brought to the last stages of completion on the order for 750 propellers, hereinabove referred to in Finding 9. Embodying this order, Capt. Schnacke, representing the United States as party of the first part, signed and transmitted to plaintiff as party of the second part a formal contract, No. 4578, dated August 29, 1918. Plaintiff refused

to accept the order or sign the contract, by reason of the fact that they required the 184 propellers to be made in accordance with specifications not in existence at the time the original order for 750 propellers had been given and which were physically impractical to apply to the propellers already brought to the final stages of completion.

Copies of Order No. 720376 and form of Contract No. 4578 are attached to the petition as Exhibit No. 6 thereof and are made part of these findings by reference.

**16.** Beginning late in August 1918 and extending into November 1918, representatives of plaintiff and of the Bureau of Aircraft Production held several conferences upon the subject of plaintiff's contracts with the War Department and their mutual obligations thereunder. Among those present representing the Bureau of Aircraft Production was its acting director, W. C. Potter, and Lt. Col. A. C. Downey, for the Contract Department, Bureau of Aircraft Production. Plaintiff was represented by its president, Spencer Heath, and counsel. The final conference was held November 13, 1918, and as a result thereof the plaintiff proposed in writing that all completed and uncompleted work on orders other than the order for Charavay propellers, #21128, as to which the defendant was to further advise plaintiff, should be paid for—

> on a basis of cost of materials, all direct and indirect labor costs, all overhead charges, direct and indirect, covering the entire period since the beginning of work on the material and 10% profit on the costs so obtained except upon the cost of any material used in connection with the work which was supplied by the Government and not paid for by us.

This proposition was agreed to by the defendant in writing.

**17.** Some time prior to February 25, 1919, plaintiff submitted to the Air Service Claims Board its claim under the Potter-Downey agreement and hearings were had thereon wherein plaintiff was confronted with an allegation of default in deliveries. The claim was disallowed by the Board February 25, 1919, because of the alleged default. July 13, 1920, the disallowance was rescinded by the Air Service Section, War Department Claims Board, and the claim

approved in the sum of $181,467.66, based upon the following set-up:

| | |
|---|---|
| 1. Inventory of finished and partly finished propellers | $37, 306. 25 |
| 2. Inventory of walnut lumber | 129, 063. 61 |
| 3. Inventory of packing boxes | 5, 756. 76 |
| 4. Loss from cancellation of packing contract with Security Storage & Trust Co | 177. 42 |
| 5. Loss on copper | 752. 15 |
| 6. Storage and insurance on inventory of finished and partly finished propellers from November 21, 1919, to June 21, 1920 | 7, 163. 48 |
| 7. Amount of payments by contractor for assisting U. S. Government officials in taking inventory April 17, 23, 1918 | 1, 143. 64 |
| 8. Office and administration expense | 114. 35 |
| Total | 181, 467. 66 |

The Government was to take title to all the property which it paid for.

Plaintiff appealed to the appeal section of the War Department Claims Board, which acted thereon April 13, 1921, and from the decision of the appeal section plaintiff appealed to the Secretary of War who, on May 7, 1921, affirmed the decision of the appeal section. Plaintiff refused to accept the decision of the appeal section, so affirmed by the Secretary of War, and on May 27, 1921, the appeal section entered an order denying all relief.

18. Plaintiff ceased manufacturing propellers for the War Department in September 1918, except for work undertaken in subsequent years, not involved in this suit.

Subsequent to the Potter-Downey agreement an inventory was taken of propellers substantially finished, and of laminations, on hand at plaintiff's plant and not paid for, applicable to the transactions hereinabove described. There were found 2,694 propellers and 4,816 laminations, of the following numbered patterns:

| Pattern number | Propellers | Laminations |
|---|---|---|
| 130 | 615 | 1, 149 |
| 149 | 10 | |
| 150 | 208 | 206 |
| 151 | 297 | 40 |
| 154 | 104 | 74 |
| 158 | 71 | 28 |
| 160 | 811 | 1, 389 |
| 165 | 578 | 1, 930 |
| | 2, 694 | 4, 816 |

Pattern no. 130 was used on contract no. 1750, order no. 20005, and contract no. 1846, order no. 20054; pattern no. 149 on contract no. 3347, order no. 20859; pattern no. 150 on contract no. 1846, order no. 20054, and on contract no. 3349, order no. 20860; pattern no. 151 on contract no. 1846, order no 20054; patterns nos. 154 and 158 on the verbal order for 750 combat propellers given in February 1918, and to which unsigned contract no. 4578, order no. 720376 relates; pattern no. 160 on contract no. 1846, order no. 20054; and pattern no. 165 on contract no. 3870, order no. 21128.

Patterns nos. 154, 158, and 165 were for combat propellers; all other patterns were for training propellers.

It is not possible from the record to allocate to the several contracts or orders the propellers and laminations so inventoried except as may be deduced from the enumerations set forth in this finding.

Material, labor, and overhead expense on these 2,694 propellers and 4,816 laminations cost plaintiff $139,150.36, which with ten-percent profit amounts to $153,065.37, no part of which has been paid by the defendant. Their salvage value is problematical. They are now in storage at plaintiff's plant.

19. In August 1919 the War Department, claiming the Government to be the owner thereof, removed from plaintiff's premises 395,040 feet of unused walnut lumber, theretofore delivered to the plaintiff for use on Government contracts for propellers and charged to plaintiff's account. Based on lumber invoiced to the plaintiff, the credit to plaintiff on account of the removal of the lumber, including expenses properly incurred thereon by plaintiff while in its possession, would be $145,741.71, which with 10% profit on such expenses, would amount to $147,142.86, in reduction of the charge theretofore made against the plaintiff.

20. The cost to plaintiff of unused packing boxes purchased especially for the shipment of propellers under the foregoing orders and contracts was $6,767.18, which with 10% profit amounts to $7,443.90. These boxes are now in plaintiff's hands. No part of $7,443.90 has been paid by the defendant. Their present salvage value is not of a substantial amount.

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21. Plaintiff's loss due to its enforced cancellation of a contract with the Security Storage & Trust Company for packing 2,900 walnut propellers applying on Signal Corps contract no. 3870, order no. 21128, amounts to $1,724.35, which with 10% profit thereon amounts to $1,896.79, no part of which has been paid by the defendant.

22. The cost to plaintiff of sheet copper and copper rivets, purchased especially for tipping propellers on the several contracts and orders not completed, and on account of stoppage of the work, not used, amounts to $1,543.89, which with 10% profit is $1,698.28, no part of which has been paid by the defendant. Their present salvage value does not appear. They are now in storage on plaintiff's premises.

23. Plaintiff's overhead expense, applicable to the contracts and orders in suit, from the date of cessation of manufacture thereunder to November 20, 1918, was $766,695.83, which with 10% profit amounts to $84,365.41, no part of which defendant has paid.

24. Plaintiff's expense for storage, fire insurance, hauling and handling, and watchmen's services, from November 21, 1918, to January 21, 1922, beyond which date there is a continuing expense for storage, was, for the material described in Finding 18, $6,277.80, which with 10% profit, aggregates $6,905.58, no part of which has been paid by the defendant.

25. Plaintiff's loss from the erection of second story and office floors of the Key Highway Plant and installation of additional equipment, described in Finding 5, making proper allowance for a proportionate part of the price of the entire building and equipment on the eventual sale thereof, amounts to $25,605.62.

26. Plaintiff expended for repairs, alterations, additions, and betterments on leased premises, used as manufacturing plants, for the purpose of expediting the production of propellers for the War Department, on contracts and orders involved herein, less a suitable proportion applicable to propellers completed and shipped, $15,583.69, which amount is a loss to plaintiff.

27. Plaintiff expended for machinery and equipment built, partially built, or purchased by it, especially for the pur-

pose of expediting the production of propellers for the War Department on orders and contracts involved herein, less a suitable proportion on machinery and equipment built or purchased applicable to propellers completed and delivered, $37,963.69. The fair salvage value thereof is $15,739.34, and the loss to plaintiff thereon is $22,224.35.

28. The expense to plaintiff of purchase and installation of 12 Cutler curtain kilns, purchased and installed under the circumstances recited in Finding 6, was, less due allowance for propellers completed and delivered, $19,035.60. The salvage value of these kilns was $2,600, and plaintiff lost the difference in value, or $16,435.60.

29. For dies made for cutting copper tips on the contracts or orders enumerated in Finding 18, less a proper allowance for propellers completed and delivered, plaintiff expended $851.76, no part of which has been paid by the defendant. They were made for a special purpose and when the occasion for their use disappeared had no value except as junk, which would be merely nominal.

30. In anticipation of orders from the War Department plaintiff purchased clamps which were thereafter found to be in excess of actual requirements. They were required as part of the equipment for the addition to the Key Highway Plant and would have been needed if orders had been received from the War Department sufficient to run the plant at its capacity. They were not in fact used, now have only an inconsiderable salvage value, which does not definitely appear, and are in storage at plaintiff's factory. Plaintiff paid for them $4,134.64.

31. In order to provide transportation equipment sufficient to care for the needs of its plant as enlarged in the manner and to the extent heretofore described, plaintiff purchased two extra motor trucks. For them plaintiff's expenditure, less a proportion applicable to propellers completed and delivered, was $5,002.83. The trucks were sold by plaintiff at a price the appropriate portion thereof, here applicable, is $2,891.13, a difference of $2,111.70, which amount was lost by plaintiff.

32. For boiler plant purchased and installed especially for the purpose of expediting the production of propellers for

the War Department the plaintiff expended, with appropriate deduction, for boilers and equipment actually used, of an amount applicable to propellers completed and delivered, $9,796.97. The fair salvage value thereon is $5,388.34, a difference of $4,408.63, which amount is a loss to the plaintiff.

**33.** The propellers, 102 in number, at $100, total $10,200, that were delivered to and accepted by the defendant, and thereafter offered to be returned, as recited in Findings 13 and 16, and embraced in the Potter-Downey agreement, did not embody any departures of design which would have rendered them less serviceable for use than propellers as to which no departure from the design was alleged, and defendant's engineering department so found to be a fact. It is conceded that plaintiff should recover on this item.

**34.** There is due the plaintiff on various unpaid items, set forth in the petition at pages 14 and 15 thereof, the sum of $57,364.51, as to which there is no dispute.

**35.** There is due the defendant from plaintiff $437,891.01 for lumber delivered by it to the plaintiff from time to time to apply on orders and contracts of the War and Navy Departments. This offset is conceded by the plaintiff and the amount thereof claimed and agreed to by the defendant.

**36.** In all instances written orders were preceded by verbal orders and plaintiff began to manufacture propellers before receipt of the formal order. In complying with all verbal orders plaintiff assumed that the issuing officers had sufficient authority therefor, and did not inquire into their contractual powers. No claim is made that the officers who gave orders for propellers, either verbal or written, did not have authority so to do.

**37.** During the period it was manufacturing propellers for the War Department plaintiff was making a considerable number for the Canadian Government.

Commencing in June 1918, plaintiff began the manufacture of propellers also for the Navy Department of the United States. All propellers manufactured for and delivered to the Navy Department have been paid for and no claim is made upon them.

38. During the progress of the work for the War Department plaintiff represented to its officers that it was investing its resources for emergency work without sufficient business from the War Department to recoup the expense, and in writing April 18, 1918, made formal protest to the Chief Signal Officer of the Army with respect to the situation complained of.

39. Plaintiff has at all times been ready, willing, and able to complete its contractual obligations to the War Department, and is now prepared to turn over to the defendant all property in its possession belonging thereto upon settlement of its claims herein.

COUNTERCLAIM

The petition in this case was filed February 25, 1922. On September 4, 1926, defendant filed a counterclaim for $19,512.44, with interest, comprising alleged unpaid additional assessment in 1920 of income taxes. An amended counterclaim was filed November 12, 1927, embracing the items of the original counterclaim and adding thereto alleged unpaid additional assessments made in 1923 and 1924, making a total of $212,870.58.

The counterclaim as amended rises under the following circumstances:

40. On or about April 27, 1918, plaintiff filed with the collector of internal revenue its corporation income-tax return for the calendar year 1917 indicating a tax due thereon of $20,506.81, and its corporation excess-profits-tax return for the same year indicating a tax due thereon of $18,242.88, a total income and profits tax of $38,749.69, which was assessed and paid.

September 2, 1920, the Commissioner of Internal Revenue made an additional assessment of $18,280.48 for 1917 against plaintiff, which plaintiff has not paid.

March 26, 1923, the Commissioner made a further additional assessment against plaintiff for 1917 of $1,954.37, which plaintiff has not paid.

Plaintiff was duly notified of both assessments.

The total of the two additional assessments for the year 1917 is $20,234.85, and there is no evidence that the basis or calculation thereof is incorrect.

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41. For the calendar year 1918 plaintiff, on or about June 16, 1919, filed with the collector its corporation income and profits tax return indicating a tax due thereon of $48,778.31, and on June 21, 1920, an amended return indicating a tax in the lesser amount of $39,304.06, a difference of $9,474.25. The original tax of $48,778.31 was assessed and paid.

June 14, 1924, the Commissioner assessed against plaintiff a tax for 1918 of $191,403.77, in addition to that already assessed and paid, and duly notified plaintiff with regard thereto. No part thereof has been paid by the plaintiff.

In its original and amended returns for 1918, plaintiff computed its war-profits and excess-profits tax under section 301 (a) of the Revenue Act of 1918. In its amended return it indicated a net income of $66,996.38 by reason of which it did not benefit by the application of section 302 of the act.

The additional assessment of $191,403.77 for the year 1918 was computed by the Commissioner by revising plaintiff's amended return for that year as follows:

| | | |
|---|---|---|
| Income reported | | $66,996.38 |
| Add: | | |
| Inventory adjustments: | | |
| (1) Walnut lumber | $70,351.95 | |
| (2) General stores | 23,442.50 | |
| (3) Material purchases overstated | 42,421.68 | |
| (4) Ordinary expenses overstated | 124.34 | |
| (5) Amortization disallowed | 106,558.87 | |
| | | 242,899.34 |
| | | 309,895.72 |
| Less additional depreciation allowed | | 6,429.24 |
| Amended net income | | 303,466.48 |

The invested capital was computed by the Commissioner as follows:

| | |
|---|---|
| Capital stock | $12,900.00 |
| Surplus | 82,070.90 |
| Reserve for bad debts | 425.00 |
| | 95,395.90 |
| Less 1917 tax due June 15, 1918, $40,741.71 prorated 200 days | 22,324.23 |
| (6) Adjusted invested capital | 73,071.67 |

With these adjustments the Commissioner computed the profits-tax liability under section 301 of the Revenue Act of 1918 as $234,527.45 and under section 302 thereof, $231,-

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873.18. The ultimate tax he accordingly figured as follows, deducting from net income an item of $352.49 interest on obligations of the United States, theretofore included by the taxpayer in gross income:

| | | |
|---|---|---|
| Net income | | $303, 466. 48 |
| Less: | | |
| Profits tax | $231, 873. 18 | |
| Exemption | 2, 000. 00 | |
| Interest | 352. 49 | |
| | | 234, 225. 67 |
| | | 69, 240. 81 |
| Taxable at 12% | | 8, 308. 90 |
| Profits tax | | 231, 873. 18 |
| Total tax liability | | 240, 182. 08 |
| Less previously assessed and paid on original return | | 48, 778. 31 |
| Additional tax | | 191, 403. 77 |

(1) *Walnut lumber, $70,351.95.*—The sum of $70,351.95, added by the Commissioner to inventory, is the amount used by plaintiff in its return to reduce an inventory of lumber December 31, 1918, to its estimate of "realizable value." Without such reduction its inventory of lumber would stand at the price delivered and invoiced to it by the Government under the contracts and orders hereinabove described. The Commissioner valued the walnut lumber on hand at the time of the closing inventory at cost, which was $108,477.98 greater than the market value.

(2) *General stores, $23,442.50.*—In its return for 1918 plaintiff reduced its inventory of general stores, taken December 31, 1918, at cost, by $23,442.50, to adjust the inventory to market value. The fair market value was $28,545.79, and the inventory at cost $51,988.29. The said sum of $23,-442.50 is the addition to inventory of general stores made by the Commissioner.

(3) *Material purchases overstated, $42,421.68.*—The sum of $42,421.68 added by the Commissioner to inventory for "material purchases overstated" was accounted for by the examining field agents of the Bureau of Internal Revenue as "machinery purchases charged to operation instead of being capitalized." There is no satisfactory proof that the Commissioner's adjustment of this item is incorrect.

(4) *Ordinary expenses overstated, $124.34.*—The increase in inventory by reason of "ordinary expenses overstated" was $124.34. There is no satisfactory proof that this adjustment by the Commissioner was incorrect.

(5) *Amortization disallowed, $106,558.87.*—In its first return for 1918 plaintiff claimed for amortization of war facilities $111,388.67, decreasing it to $106,558.87 in the amended return. For the Key Highway Plant plaintiff, out of the amortization of $106,558.87, claimed as applicable to the year 1918, $51,120.75. This is a fair amount for amortization of the Key Highway Plant for the year 1918.

A reasonable allowance for amortization on miscellaneous machinery, tools, and equipment, used in the manufacture of articles contributing to the prosecution of the war is, for the year 1918, $45,667.82.

The total reasonable amortization for plant and machinery is $96,788.57.

(6) *Adjusted invested capital, $73,071.67.*—In its amended return for 1918, plaintiff reported a net invested capital of $192,456.83. Plaintiff calculated this as follows:

| | |
|---|---|
| Capital stock | $120,000.00 |
| Surplus | 122,097.98 |
| Total | 242,097.98 |

From which it deducted the following items:

| | |
|---|---|
| Valuation of patents | 38,404.55 |
| Proportion of Federal taxes paid | 11,236.60 |
| Total | 49,641.15 |
| Net invested capital | 192,456.83 |

The Commissioner revised the net invested capital to $73,071.67, calculated as follows:

| | |
|---|---|
| Capital stock | $12,900.00 |
| Surplus | 82,070.90 |
| Reserve for bad debts | 425.00 |
| Total | 95,395.90 |

From which he deducted:

| | |
|---|---|
| Proportion of Federal taxes due | 22,324.23 |
| Net invested capital | 73,071.67 |

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Upon its organization plaintiff acquired as assets the patent rights on the design and construction of propellers, hereinabove described in Finding 1, issuing stock of the par value of $107,100 therefor. Their value January 1, 1918, depreciated from $107,100, was $68,154.45. At the time of their acquisition, the patents were worth the par value of the stock so issued.

These patents were essential to the conduct of plaintiff's business. At the times involved in this suit propellers made according to the design and construction, so patented, were of demonstrated superiority, generally, over other propellers and plaintiff's success depended materially on this fact.

There is not sufficient evidence to make a calculation of plaintiff's net invested capital and the amount of its taxes for the year 1918 except by using the Commissioner's computation as the basis and revising it where the evidence shows it to be incorrect.

The court, in its original decision, decided that plaintiff was entitled to a net recovery of $16,254.96; but on motions for new trial the court decided, in accordance with its memorandum opinion, *post*, that the Government was entitled, on its counterclaim, to a net recovery of $21,895.89, with interest.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff during the World War was engaged in the manufacture of airplane propellers and was given a series of orders by defendant for these propellers. In preparation for the work required and in order to expedite it, the plaintiff enlarged its plant, installed additional machinery and equipment and otherwise increased its facilities. As the work progressed the defendant suspended or canceled orders which it had given by reason of change in design or some other cause and finally as the war came to a close suspended work on the contracts altogether. Some of the propellers ordered were finished and paid for, some were finished but not paid for, and there were a large number upon which more or less work had been done at the time when the contracts were canceled. After all work on the propellers had ceased by reason of directions received from defend-

ant, the plaintiff and defendant entered into an agreement known as the Potter-Downey agreement which provided for payment to the plaintiff for the work it had done on the unfinished propellers and for the cost of material used in this work. But after this agreement had been executed the plaintiff and defendant were still unable to agree as to the amount to which plaintiff was entitled under the contracts and plaintiff has not been paid even the amount provided for by this so-called Potter-Downey agreement. Plaintiff now brings this suit to recover the amount which is due under this agreement and also the loss and damage which it alleges it has sustained by reason of the suspension and cancellation of the contracts.

The defendant has filed a counterclaim for taxes assessed for the three years 1917, 1918, and 1919 but it is conceded that any further collections for the years 1917 and 1919 are barred by the statute of limitations.

In plaintiff's petition, seventeen items of charges, loss and damage are listed against defendant totaling $582,129.04. Plaintiff concedes, however, that there is due the defendant for lumber $437,891.01 and asks judgment for the balance, $144,238.03.

Eight of plaintiff's claims are conceded by defendant and it is only necessary in determining the amount of plaintiff's recovery to pass on the disputed items which will be hereinafter set out and considered.

Among the claims disputed by defendant is one for $84,365.41 "for continuing overhead expenses from date of discontinuance of manufacture to date of termination of contracts" which includes 10 per cent profit thereon.

The so-called Potter-Downey agreement which will be considered more at length hereinafter provided for the payment to plaintiff of overhead expenses and 10 per cent profit thereon. The agreement clearly covered the claim now being considered but it is said that plaintiff was at the same time engaged on work for other parties and that it has failed to establish by the evidence the proportion of overhead properly chargeable to defendant. This is a question of fact upon which the commissioner of this court found in favor of the plaintiff. After reviewing the evidence we

agree with the court commissioner and think it would serve no useful purpose to discuss the oral and written testimony in relation to this item. It is therefore allowed to plaintiff.

The next item of plaintiff's claims disputed by defendant is $34,306.55 "for loss resulting from erection of second story and office floors of claimant's Key Highway Plant and from installing additional special equipment therein."

The evidence shows that in preparation for the work contemplated by the contracts the plaintiff added a second story to what was known as its Key Highway Plant and that this second story was specially fitted and equipped for use in connection with the lower story in constructing propellers. Defendant does not deny this but says that there was no agreement that the Government should pay for an addition to plaintiff's plant, or for additional machinery and equipment, and if there had been such an agreement the officer of defendant that made the arrangements with plaintiff had no authority to make any such contract. This may be conceded for the purposes of the argument but we do not think these matters prevent plaintiff's recovery thereon. The evidence, however, does show that Lieutenant Ryerson, head of the propeller section who was charged with making arrangements for the production of propellers for the air service, visited plaintiff's plant and while expressing himself as pleased with it in a general way said it did not have capacity to manufacture the number of propellers that the War Department required and urged plaintiff to add another story with additional facilities, and plaintiff, through its president, agreed so to do. Subsequently, having in the meantime received orders for a very large number of propellers, the plaintiff went ahead with the construction of the second story which was completed sometime in the middle of summer in 1918.

The case is very similar to that of the *Barrett Co.* v. *United States*, 273 U. S. 227. In that case the Navy Department contracted for certain materials to be furnished within a given time. The contract also provided for the construction of a plant with equipment with which to carry out its provisions. The plaintiff, believing that a larger plant than was contracted for would be necessary for the manufacture of the material required by the Government, expended a large sum

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to increase its capacity. None of these changes were directly authorized or approved by the Navy Department but the Supreme Court said that the plaintiff was entitled to just compensation under the statute and that just compensation included "the outlay which it can show there was reasonable ground for making in order to fulfill its engagements." What we have stated above with reference to the case now before us shows that as the Government requirements were presented to plaintiff there was abundant reason for an enlarged plant and additional facilities.

The defendant, however, contends that the *Barrett Co. case*, *supra*, and other similar cases have no application for the reason that they were based on the statute of June 15, 1917, which provided for just compensation whenever war contracts were suspended, canceled, or modified but applied only to contracts for the "building, production, or purchase of ships or material", and that other language in the statute shows that the word "material", as used therein, refers only to stores, supplies, and equipment for ships. This seems to be a very narrow construction of the statute but we can find no case in which it has otherwise been applied. The defendant not only insists that the statute referred to above has no application to the case now before the court, but says also that if it did apply, the contracts were not canceled pursuant to its provisions. We do not think this precludes the plaintiff from recovering for loss or damage occasioned by the cancellation or suspension of the contracts. The general principles in relation to contracts will still apply and plaintiff is not left without a remedy for violation of the agreements, express or implied, made by defendant. Under well settled authority plaintiff could have elected to treat the contracts as still in force and if it had so elected could recover for potential profits, but by executing the Potter-Downey agreement it elected to consider the contracts terminated by the breach thereof made by defendant. We are clear that plaintiff may recover what it lost by reason of the cancellation of the contracts even if it be conceded that there is no special statute which so provides.

This court and the Supreme Court long ago fixed the rules for the measure of damage when a contract was suspended or canceled in the case of *Behan* v. *United States*, 18 C. Cls.

687, affirmed in *United States* v. *Behan*, 110 U. S. 338. In that case this court said that "in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained." The Supreme Court, in passing on the same question, said with reference to the contractor's rights in such a case—

> When he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services.

The Supreme Court went on further to say that the contractor may also claim and recover, if proved, anticipated profits. In the case at bar there is no attempt to show any anticipated profits, probably because the Potter-Downey agreement rendered such profits not recoverable, but the Supreme Court went on to say that—

> It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend * * * after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract.

There is nothing to show that any of the expense incurred by the plaintiff was extravagant and unnecessary for the purpose of carrying out the contracts. On the contrary, when we consider all of the testimony and the circumstances under which the contracts were made it appears that plaintiff had good cause and reason to make the additional expenditures by reason of which it incurred the losses which it now seeks to recover. The contracts were made in war times. It is a matter of common knowledge that the Government was then in urgent need of airplanes. War never admits of delays or even of ordinary preparations and exertions. Its needs are urgent and pressing and it must have been well understood by plaintiff that it was making con-

tracts to supply what are commonly referred to as "rush orders." Plaintiff was told by one of defendant's officials that its plant was insufficient and the evidence as a whole shows that it was amply justified in providing additional facilities for hastening the completion of the orders which it received.

As a further objection to this claim, and the remainder of the disputed items, it is urged on behalf of defendant that plaintiff can not recover for loss and damage resulting from cancellation or suspension of the contracts by reason of the so-called Potter-Downey agreement set out in Finding 16 to which reference has heretofore been made. It is contended that this agreement disposed of all claims of every kind and nature which the plaintiff held against the defendant arising out of orders given for construction work.

The so-called Potter-Downey agreement was divided into two parts, one which related to the item of $10,200 for Charavay propellers which was left unsettled but is now conceded by defendant, and another part which provided that the plaintiff should—

> be paid for all *work* as it now stands on a basis of cost of materials, all direct and indirect *labor costs*, all *overhead charges* * * * and *10% profit* on the costs so obtained * * *. [Italics ours.]

It is contended on behalf of defendant that this agreement operated as a full settlement of all claims arising out of the contracts including the claims which are now in dispute. This contention can not be sustained. If it had been intended that this agreement should act as a full settlement to all claims which the plaintiff held there is every probability that it would have been so provided in express language, for this would have been the ordinary and usual course. Moreover, the agreement mentions three and only three distinct items for which payment was to be made, namely, work, labor costs, and overhead charges. It provided for the recognition and measuring of claims based on these matters. Obviously the plaintiff had other claims against the defendant growing out of the suspension and cancellation of the contracts, some of which had already been presented to defendant. There is no evidence to show

that these claims were taken up in any manner when the negotiations were had that led to the Potter-Downey agreement. On the contrary, as the agreement made specific mention of certain of plaintiff's claims against defendant this tends to show that those not mentioned were excluded from its operation. A reasonable construction of the Potter-Downey agreement under all of the circumstances of the case shows that it settled nothing except those matters included in its specifications, and it can not properly be contended that these specifications covered the claim for the addition of the second story to the Key Highway Plant and the equipment connected therewith or any of the remaining disputed claims which will next be considered. This claim therefore should be allowed.

The amount of the loss of plaintiff incurred by reason of the construction of the second story of the Key Highway Plant with its equipment was found by the court commissioner to be $25,605.62, and with this finding we concur. Plaintiff also claims to be entitled to 10 per cent profit on this amount, or a total of $34,306.55, but no explanation is given as to why a profit should be allowed thereon. It is plain and we have already held that the item was not covered by the Potter-Downey agreement which provided for 10 per cent profit on certain items. Plaintiff should be awarded compensation for its loss but there is no reason why it should be allowed a profit thereon and this portion of plaintiff's claim is denied. For the same reason the plaintiff can not be allowed profit on any of the disputed items hereinafter mentioned.

There is no exception to the finding that plaintiff expended for repairs, alterations, additions, and betterments on leased premises, used as manufacturing plants, for the purpose of expediting the production of propellers for the War Department, on contracts and orders involved herein, less a suitable proportion applicable to propellers completed and shipped, $15,583.69. These expenses were a loss to plaintiff except in so far as they facilitated work upon the propellers which were completed and paid for and for this matter a deduction is made. Plaintiff should be allowed $15,583.69 on this item.

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On its claim for what it expended for machinery and equipment for the purpose of expediting the production of propellers, the plaintiff is entitled to recover the cost thereof, less a suitable deduction on account of propellers completed and delivered and a further deduction of the salvage value. Under this rule the facts found show that plaintiff is entitled to recover $22,224.35.

Another claim of plaintiff is based on the purchase and installation of twelve Cutler curtain kilns which were facilities added for the purpose of more rapidly completing the contracts, and the cost thereof, less due allowance for propellers completed and delivered, was $19,035.60. We think there is some evidence that tends to show that the market value of these kilns after the cancellation of the contracts was only $2,600. This would be the salvage value of the property and on this basis plaintiff sustained a loss of $16,435.60, which should be allowed in computing its damages.

The claim for $851.76 for dies (see Finding 29) should be allowed plaintiff, but the item of $4,134.64 for clamps purchased in excess of normal requirements can not be allowed for the reason that the purchase was made in anticipation of further orders and contracts which never were received from the Government.

We think the plaintiff should be allowed $2,111.70 on account of extra motor trucks purchased to increase the facilities of the plant, and also $4,408.63 on account of boilers and equipment used in connection therewith purchased and installed to expedite the production of propellers.

There is no claim that anything has been paid plaintiff on any of these disputed items.

The facts which support the eight items or claims made on behalf of plaintiff upon which defendant concedes plaintiff is entitled to recover are set out in Findings 18, 19, 20, 21, 22, 24, 33, and 34. The total of the items conceded in plaintiff's favor is $385,717.29. Adding this amount to the total of the amount allowed plaintiff on the disputed claims, we find that the aggregate sum allowed plaintiff is $557,304.05. From this should be deducted $437,891.01, which plaintiff concedes is due defendant for lumber. The balance, $119,413.04, is the

amount we find plaintiff is entitled to recover on the various claims set out in its petition. Plaintiff claims to be entitled to interest on part of this sum, but plaintiff's recovery is not based upon a statute which awards "just compensation", and under the general rules with reference to contracts no interest can be allowed.

DEFENDANT'S COUNTERCLAIM

In the year 1924 the Commissioner of Internal Revenue made an additional assessment of income taxes against the plaintiff for the year 1918 in the amount of $191,403.77, no part of which has been paid. The counterclaim is based on this assessment. The plaintiff asserts that the assessment resulted principally from the fact that the Commissioner of Internal Revenue added large sums to plaintiff's gross income and greatly increased its net income by refusing to allow the plaintiff to set up its closing inventory for the year in question at its then market value and by substituting in lieu thereof the cost of the inventoried articles which were purchased while this country was at war. Plaintiff further contends that when the Commissioner of Internal Revenue increases the taxpayer's closing inventory and thus increases its income for the year in question the burden is upon the defendant to establish that the change was correctly made and that as defendant has presented no evidence on this point the additional assessment must be set aside. We do not need to determine what the rule would be if the Commissioner had claimed on the trial of the case that plaintiff's taxes should be larger than the amount which was assessed, or had otherwise sought to show that his ruling in the matter was incorrect, for no such claim is made here. The defendant relies on an assessment regularly made. It was the final decision of the Commissioner and it is well settled that his determination is *prima facie* correct. This rule is founded in reason for the taxpayer has full knowledge of all of the facts pertaining to a proper assessment while often the Government officials are without the means of obtaining proper information. A contrary rule would often put the Government at the mercy of an unscrupulous taxpayer whose dealings were not open and above board.

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The plaintiff, however, insists that even if it has the burden of proof, this burden has been met and sustained by the evidence which it introduced. With this conclusion we do not agree, but, on the contrary, have found that the evidence in the case is not sufficient to enable a calculation of plaintiff's taxes to be made except by using the Commissioner's computation as a basis. This conclusion, however, does not, in our opinion, prevent corrections being made in definite and specific items where it is shown that the Commissioner's action was erroneous, and the same rule applies to inventories.

The plaintiff owned certain valuable patents which it had acquired by issuing stock of the par value of $107,100 therefor. As the evidence shows that the stock was worth par, the patents may be said to have a cash value of that amount. The Commissioner, however, did not include anything on account of the patents in the amount found by him to be the invested capital of the plaintiff. The total amount of capital stock outstanding was $120,000. The revenue act of 1918 provided with reference to intangible property which formed a part of invested capital that the taxpayer, in making up the amount of its invested capital, might include either the actual cash value of such property, or the par value of the stock or shares issued therefor, or 25 per cent of the par value of the stock outstanding, whichever is the lowest. The taxpayer therefore was entitled to have included in its invested capital 25 per cent of the par value of the total amount of the stock outstanding, which was $30,000, and this amount should be added to the amount of invested capital as found by the Commissioner.

In its return for 1918 as amended the plaintiff claimed $106,558.87 for amortization of war facilities. The Commissioner of Internal Revenue disallowed this claim and the court commissioner found that a reasonable amount for amortization was $96,788.57. It is contended on behalf of defendant that if plaintiff's damage claims based on expenses incurred and losses sustained on special facilities in the way of buildings and material acquired for the purpose of completing the contracts are allowed, plaintiff can not also have amortization for the same items.

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Amortization is allowed, if at all, under the provisions of the statute (sec. 234 (a) (8), revenue act of 1918)—

> in the case of buildings, machinery, equipment, or other facilities, constructed, erected, installed, or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the present war.

The statute further provides that—

> there shall be allowed a reasonable deduction for the amortization of such part of the cost of such facilities or vessels *as has been borne by the taxpayer*. [Italics ours.]

Every item for which amortization could be properly claimed is included in the allowances already made to plaintiff for damages sustained by reason of the defendant's suspension or cancellation of the contracts, consequently the costs involved have not been borne by the taxpayer. The taxpayer has lost nothing by reason of these matters and is not entitled to amortization therefor. See *A. J. Tower Co.* v. *Commissioner*, 38 Fed. (2d) 618.

It may be argued that in the case last cited above the items of damage which also covered the matters for which plaintiff claimed amortization, had been previously allowed and determined, while in the case at bar the defendant had disputed and is still disputing the validity of these claims; and the costs or expenses which plaintiff seeks to have amortized have so far been borne by the taxpayer. We do not think a reasonable construction of the act requires that such a distinction should be made. The effect of such a construction in cases like the one at bar, or in any case in which the Government did not make settlement of the damage claims within the taxable year, would be that a taxpayer would not only recover the amount of his costs and expenses as damages but receive another allowance of the same kind by way of amortization. Congress intended by the amortization provisions of the act to compensate the taxpayer for losses actually sustained and not for a cost which the court's order repaid to him. We think the words "borne by the taxpayer" mean that the taxpayer on the final adjudication of his account with the Government sustains the burden

of the costs and expenses which he seeks to have amortized. What is said in *U. S. Cartridge Co.* v. *United States*, 284 U. S. 511, as to the difference between obsolescence and amortization has no application here.

Plaintiff also contends that in computing its net income for 1918 the Commissioner erred in using the cost price as the value of the lumber on hand which was included in its closing inventory. Plaintiff claims that the market price at the close of the year should have been used instead and asks to have a deduction made from the inventory of the difference between the cost and market price of the lumber. We do not understand on what theory the Commissioner based his action. In one division of the argument, defendant assumes that the lumber never was the property of plaintiff, but if this were so it is manifest that nothing should be included in the inventory on account of it. We do not need, however, to consider this assumption as it is entirely inconsistent with the position of both parties. The facts are that the defendant furnished the plaintiff with a large quantity of walnut lumber and made a charge against plaintiff for it. This charge and the amount thereof is conceded by plaintiff. After the contracts were canceled, defendant removed or took back the unused portion of the lumber and plaintiff claims a credit on account of this action. This credit and the amount thereof is conceded by defendant and we have followed these concessions in determining the amount which plaintiff is entitled to recover. On this basis, defendant again objects on the ground that plaintiff has been allowed a credit for the lumber returned and having lost nothing by reason of the defendant having taken back the unused lumber it is not entitled to any amortization thereon. But this is not an amortization item. It is a matter of inventory and the question is, What was the amount of plaintiff's inventory at the close of the year 1918? At that time defendant had not taken back the lumber and plaintiff had no assurance that defendant would take it back and give a credit for the lumber thus returned. The case of *U. S. Cartridge Co.*, *supra*, involved a similar situation. In that case, as in the case now before us, the Government subsequently took back certain property or made settlement for it, but the Supreme Court decided that the closing inventory

of the taxpayer should be based on the market value of the property then held by it during the tax year under consideration. Following the decision in this case, a correction should be made in the calculation of the tax by the Commissioner of Internal Revenue by deducting from the amount of the inventory as found by him the difference between the market value of the lumber then held by the taxpayer and the cost price thereof as used by the Commissioner. This difference is $108,477.98.

Another correction should be made in the Commissioner's calculation of the tax for 1918. In determining the amount of net income he fixed the value of what have been called by both parties "general stores" in the closing inventory at cost when it should have been fixed at the market value. This made a difference of $23,442.50, for which plaintiff is entitled to a deduction from the amount of net income fixed by the Commissioner.

The Commissioner, in computing the net income of plaintiff for 1918, included in the inventory $42,421.68 for purchases which he found to have been erroneously not capitalized. Plaintiff claims this was an error but no satisfactory evidence has been presented to support this claim and it is disallowed.

After making the corrections in invested capital and net income as stated above, we find that the 1918 tax of plaintiff should be computed on the basis of $103,071.67 as the invested capital and $171,546.00 as the net income. Making the calculation on this basis, we find that the excess profits tax of plaintiff for 1918 is $100,916.17 and its income tax, $8,235.58, making a total of $109,151.75. Plaintiff paid on its tax for that year $48,778.31. The tax was therefore underpaid in the sum of $60,373.44.

The circumstances of the case cause the question to arise as to whether the defendant should be allowed interest on the deficiency for 1918. We have already found and determined that at the close of 1918 defendant was indebted to plaintiff on the matters which form the basis of plaintiff's suit in a sum much larger than the amount of this tax, but we have also decided that plaintiff could not be allowed any interest

thereon. The statute provides for interest on the tax from the time it was assessed, and it may seem quite inequitable that the defendant should be allowed interest on the amount of this tax for a number of years during all of which it was indebted to the plaintiff. If the case were between private individuals to be decided upon their respective claims such a result would not follow; but, as was said in *United States* v. *Verdier*, 164 U. S. 213, 218:

> * * * we are unable to see how the fact that there were mutual claims can authorize us to disregard the plain letter of the statutes.

In the case last cited, each party had claims against the other. The Government first established its claims and in another case obtained a judgment against Verdier which under the statute drew interest. Verdier then brought suit in the Court of Claims to recover a portion of his salary due him by readjustment under a special statute. The Court of Claims found that the Government was indebted to Verdier at the time it obtained its judgment although the amount had not then been ascertained in a sum greater than the amount owed by Verdier to the Government. As the law did not permit Verdier to be allowed any interest, the Court of Claims held that it would be inequitable to allow the Government interest and entered its judgment accordingly. When the case came before the Supreme Court on appeal that court said:

> It would certainly seem to be equitable that, if the government were indebted to Verdier at the time it obtained judgment against him, it should not charge him with interest upon its judgment. But interest being a matter of purely statutory regulation, we are bound to give or withhold it as the statute directs.

The court also said:

> An inherent vice of petitioner's argument is in the assumption that he and the government stand upon an equality with respect to interest. The truth is that in its dealings with individuals public policy demands that the government should occupy an apparently favored position. It may sue, but, except by its own consent, cannot be sued. In the matter of costs it recovers

but does not pay, and the liability of the individual would not be affected by the fact he had a judgment against the government which did not carry costs. (Citing many cases previously decided by the Supreme Court.)

While the case last cited does not involve a claim for taxes, the principles laid down in its decision apply here. Interest will be computed on the amount of plaintiff's tax for 1918 at six per cent from June 14, 1924, when the Commissioner made the additional assessment, to the date of the judgment herein, April 6, 1936. The interest so computed is $42,784.64, which added to the amount of the underpayment of the tax makes a total of $103,158.08 due defendant upon its counterclaim. Subtracting this from the amount which we have found plaintiff is entitled to recover on the cause of action set out in its petition, the balance in favor of plaintiff is $16,254.96 for which judgment will be entered in its favor accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

MEMORANDUM OPINION ON MOTIONS FOR NEW TRIAL

Both plaintiff and defendant have filed motions to set aside the judgment and grant a new trial. The argument upon these motions raises some questions that were not before presented by counsel or considered in the original opinion and as to which it may be well to state something further.

The plaintiff does not now ask that interest should be computed on the amount of its recovery but contends that so far as necessary the amount to which it was found entitled should be applied upon the tax to extinguish it, which to this extent would have the same effect as if interest were allowed. But we can find no authority for applying in payment upon a tax previously assessed the amount later allowed by the court on an unliquidated and disputed claim not relating to taxes. The conclusion we have reached brings an inequitable result, but the inequity is not in the failure to make the credit but in not allowing interest on

plaintiff's claim. In this matter we are compelled to follow the law as we find it. The motion of plaintiff must be overruled.

The defendant's motion to set aside the judgment, among other matters, sets up a claim that the calculation of plaintiff's tax based on the net income and invested capital as determined by the court in the opinion, was not correctly made. A recomputation shows that this contention must be sustained, and it follows that the judgment heretofore entered should be set aside. The total amount of plaintiff's income, war-profits, and excess-profits tax for 1918, when correctly calculated, is found to be $131,479.60. The tax previously paid was $48,778.31, leaving an underpayment of $82,701.29. The interest thereon at six per cent from the date of the additional assessment to April 6, 1936, the date of the establishment of plaintiff's claim and entry of judgment under the opinion, is $58,607.64, thus making the total allowance upon the counterclaim $141,308.93. Deducting therefrom the amount allowed the plaintiff upon its claim, $119,413.04, there remains $21,895.89, for which judgment should be rendered in favor of defendant with interest from that date.

The defendant, in a supplement to its motion for new trial, urges that interest should be computed at the rate of twelve per cent on the amount of the additional assessment, but this penalty is imposed, if at all, under the applicable statute after a demand is made for the payment of the tax. The record fails to show that any demand was made and we can not presume that it was. On the contrary, in view of the fact that plaintiff at the time was claiming that the defendant was indebted to it in a sum larger than the amount of the tax, it is more probable that no such demand was made.

The contention as to interest and the other objections made on behalf of the defendant will be overruled. Some minor additions to the findings will be made which do not affect the result. These will be shown in the judgment entry. The last finding (42) will be stricken out as pertaining to a claim and issue now abandoned.

# THE CHOCTAW NATION v. THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS

[No. J-231. Decided April 6, 1936]

*On the Proofs*

*Indian claims, special jurisdictional Act; additional part of proceeds from common property of Choctaw and Chickasaw Nations.*—Under the treaties and laws providing for and governing the distribution of funds realized from the common property of the Choctaw and Chickasaw Nations of Indians, the Choctaws have been and are entitled to three-fourths, and the Chickasaws to one-fourth, of such funds.

*The Reporter's* statement of the case:

*Messrs. R. M. Rainey, W. F. Semple, W. B. Johnson,* and *S. B. Flynn* for the plaintiff.

*Mr. Charles H. Small,* with whom was *Mr. Assistant Attorney General Harry W. Blair,* for the United States. *Mr. George T. Stormont* was on the brief.

*Mr. Melvin Cornish* and *Williams H. Fuller* for the Chickasaw Nation of Indians.

The court made special findings of fact as follows:

1. By the act of Congress approved June 7, 1924 (43 Stat. 537), as modified by joint resolution approved May 19, 1926 (44 Stat. 568), it was provided:

> That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.
>
> SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred

unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act. The claim or claims of each of said Indian nations shall be presented separately or jointly by petition in the Court of Claims, and such action shall make the petitioner party plaintiff or plaintiffs and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and said contract with such Indian tribe shall be executed in behalf of the tribe by the governor or principal chief thereof, or, if there be no governor or principal chief, by a committee chosen by the tribe under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior: *Provided, however*, That the attorney or attorneys employed as herein provided may be assisted by the regular tribal attorney or attorneys employed under existing law under direction of the Secretary of the Interior, with such additional reasonable and necessary expenses for said tribal attorneys to be approved and paid from the funds of the respective tribes under the direction of the Secretary of the Interior, as may be required for the proper conduct of such litigation. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of the above-named Indian nations to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nations.

SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nations, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

SEC. 5. That upon the final determination of any suit instituted under this Act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid any attorney or attorneys, other than the regular tribal attorney or attorneys employed under

existing law, employed by said Indian nations for the services and expenses of said attorneys rendered or incurred subsequent to the date of approval of such contract: *Provided*, That in no case shall the aggregate amounts decreed by said Court of Claims for services and expenses be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States.

SEC. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case.

2. Under the provisions of the foregoing Act, the plaintiff filed the petition herein, on April 24, 1928. Thereafter, on January 5, 1935, upon motion of the Assistant Attorney General representing the United States, the Chickasaw Nation was made a party defendant, under the provisions of section 6 of the Act.

3. On September 27, 1830, the Chocktaw Nation entered into a treaty with the United States (7 Stat. 333), by the terms of which the Choctaw Nation ceded all its lands east of the Mississippi River to the United States in exchange for a certain described tract of country west of the Mississippi River which was later known as Indian Territory and is now part of the State of Oklahoma. Articles 2, 3, and 4 of this treaty are hereby made a part of this Finding by reference.

Thereafter the larger portion of the Choctaw Indians moved to the lands secured to them in Indian Territory and has since resided there.

4. On October 20, 1832, the United States and the Chickasaw Nation of Indians entered into a treaty (7 Stat. 381), under the terms of which the Chickasaw Nation ceded all its lands east of the Mississippi River to the United States and agreed to remove therefrom to such territory west of the

Mississippi River as might later be determined. Articles 1 and 2 of this treaty are hereby made a part of this Finding by reference.

5. On January 17, 1837, the Choctaw Nation and Chickasaw Nation entered into a treaty (11 Stat. 573), to which the United States assented, under the terms of which the Chickasaw Nation for a consideration of $530,000, bought an interest in the lands west of the Mississippi River, which had previously been ceded to the United States by the Choctaw Nation, and thereafter removed to a district within the limits of the Choctaw country, upon which they have since resided. Articles 1, 2, 3, and 5 of this treaty are hereby made a part of this Finding by reference.

Subsequently, on November 4, 1854, the Choctaw and Chickasaw Nations entered into a further treaty (10 Stat. 1116), in which the boundaries of the Chickasaw district were restated, otherwise, the treaty of January 17, 1837, remained in full force and effect.

6. On June 22, 1855, the United States and the Choctaw and Chickasaw Nations entered into a treaty (11 Stat. 611), the purposes of which, so far as here pertinent, are stated in the preamble of the treaty as follows:

> Whereas, the political connexion heretofore existing between the Choctaw and the Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States: and whereas, the United States desire that the Choctaw Indians shall relinquish all claim to any territory west of the one hundredth degree of west longitude, and also to make provision for the permanent settlement within the Choctaw country, of the Wichita and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to lease, on reasonable terms, to the United States, that portion of their common territory which is west of the ninety-eighth degree of west longitude: * * *

Articles 1, 2, 3, 4, 5, 6, 7, 9, and 10 of this treaty are hereby made a part of this Finding by reference.

7. On April 28, 1866, the United States and the Choctaw and Chickasaw Nations entered into a further treaty (14 Stat. 769).

Articles 3, 30, 33, 37, and 46 of this treaty are hereby made a part of this Finding by reference.

8. The members of the Dawes Commission to the Five Civilized Tribes, representing the United States, entered into an agreement with the Choctaw and Chickasaw Nations on April 23, 1897, providing for allotments in severalty of their common lands and the sale or disposition of other common properties of the tribes. This agreement was ratified and confirmed by the act of June 28, 1898 (30 Stat. 495), and was subsequently approved by a majority vote of the members of each of the tribes. This agreement, known as the Atoka Agreement, set out in section 29 of the said Act, is hereby made a part of this Finding by reference.

9. The United States and the Choctaw and Chickasaw Nations entered into a further agreement on March 21, 1902 (32 Stat. 642). This agreement, known as the "Supplemental Agreement", contained detailed provisions for the enrollment of the members of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty, the sale of the residue of such lands after allotments had been made and equalized, the laying out of town sites, the sale of town lots, the reservation and sale, or disposition otherwise, of coal and asphalt lands and other common properties of the two tribes, and the distribution of all moneys arising therefrom. This agreement, by reference, is hereby made a part of this Finding.

10. During the period between June 28, 1898, and June 30, 1929, the United States collected in connection with the sale or disposition otherwise of the common properties of the Choctaw and Chickasaw Nations the sum of $34,470,650.27. These moneys were brought into the Treasury of the United States and credited to the respective tribes on the basis of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation, and were disbursed to the members of the respective tribes upon that basis.

11. The approved final rolls of the Choctaw Nation of Indians contains the names of 20,799 members entitled to share in the per capita distribution of the Choctaw tribal funds. The approved final rolls of the Chickasaw Nation of Indians contain the names of 6,304 members entitled to

share in the per capita distribution of the Chickasaw tribal funds.

The ratio of members of the Choctaw Nation to the total membership of the two Nations, as shown by the approved final membership rolls of the two tribes, is 76.74%, and that of the Chickasaw Nation 23.26%.

12. If the United States had apportioned and paid the moneys involved ($34,470,650.27), on the basis of 76.74% to the Choctaw Nation, and 23.26% to the Chickasaw Nation, the Choctaws would have received $599,789.31 more than they did receive, and the Chickasaws would have received that much less.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The Choctaw Nation of Indians brings this suit under the authority of the Special Jurisdictional Act of June 7, 1924, 43 Stat. 537. Section 1 of the act provides:

> That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

Section 6 of the Act provides:

> The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

Upon motion of the Assistant Attorney General the Chickasaw Nation of Indians, on January 5, 1935, was made party defendant by order of the court, and the case comes

on for trial with the Choctaw Nation party plaintiff, and the United States and the Chickasaw Nation parties defendant.

During the period from June 28, 1898 to July 1, 1929, the United States collected the sum of $34,470,650.27 in connection with the disposition and management of the common lands and property of the Choctaw and Chickasaw Nations. These moneys, with few exceptions, were brought into the Treasury of the United States and credited on the books of the defendant, in the proportion of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation. The moneys credited to the Choctaw Nation were disbursed directly to members of that Nation on a per capita basis or were otherwise expended for their use and benefit, while the moneys credited to the Chickasaw Nation were likewise disbursed per capita to members of that tribe or otherwise distributed for their use and benefit.

The plaintiff Indians contend that the apportionment and payment of the moneys involved should have been made on the basis of the total membership of the two Nations, and not on the basis of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation, by which method of apportionment and payment of the moneys it is asserted that the Choctaws have received less, and the Chickasaws have received more, than they were respectively entitled to receive. It is contended that the correct basis for the apportionment and payment of the moneys was 76.74% to the Choctaws and 23.26% to the Chickasaws, that being the proportion the individual membership of the respective Nations bore to the combined membership of the two tribes as shown by the approved final membership rolls—20,799 Choctaws, and 6,304 Chickasaws. In other words the plaintiff tribe contends that the moneys should have been disbursed on a per capita basis to the individual members of the Choctaw and Chickasaw Nations without reference to tribal enrollment.

The United States and the Chickasaw Nation contend that the basis for the apportionment and payment of the moneys, in the proportion of three-fourths to the Choctaws and one-fourth to the Chickasaws, was the proper and legal basis, so

fixed and agreed upon in various treaties between those Nations and the United States, and in numerous acts of Congress dealing directly with the apportionment and payment of such moneys. It is further contended that the apportionment and payment of the moneys involved, in the proportion of three-fourths to the Choctaws and one-fourth to the Chickasaws, has, in fact, resulted in all individual members of the two Nations receiving substantially equal shares.

Prior to 1830 the Choctaw Nation of Indians occupied lands east of the Mississippi River in the States of Mississippi, Tennessee, and Alabama. On September 27, 1830, the Choctaw Nation and the United States entered into a treaty (7 Stat. 333) under the terms of which the Nation ceded to the United States all its lands east of the Mississippi River in exchange for certain lands located in what is now the State of Oklahoma, to which lands it soon thereafter moved.

The Chickasaw Nation prior to 1832 lived east of the Mississippi River and occupied lands in the States of Tennessee and Mississippi. In October 1832 that Nation and the United States entered into a treaty under the terms of which the Chickasaw Nation sold and ceded all its lands east of the Mississippi to the United States and agreed to remove therefrom to such territory west of the Mississippi River as should later be determined upon. The United States agreed to sell the lands so ceded, as soon as it could "conveniently be done", the proceeds thereof to go to the Chickasaw Nation under the terms stipulated in the treaty.

On January 17, 1837, the Choctaw Nation and the Chickasaw Nation made and entered into a treaty (11 Stat. 573) under the terms of which the Chickasaw Nation, for a consideration of $530,000, bought an interest in the lands in Indian Territory occupied by the Choctaw Nation. Article I of this treaty reads:

> It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the *right* of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw dis-

> trict of the Choctaw Nation, to have an equal representation in their General Council, and to be placed on an equal footing in every other respect with any of the other districts of said nation, except a voice in the management of the consideration which is given for these rights and privileges; and the Chickasaw people to be entitled to all the rights and privileges of Choctaws, with the exception of participating in the Choctaw annuities, and the consideration to be paid for these rights and privileges, and to be subject to the same laws to which the Choctaws are; but the Chickasaws reserve to themselves the sole right and privilege of controlling and managing the residue of their funds, as far as is consistent with the late treaty between the said people and the Government of the United States, and of making such regulations and electing such officers for that purpose as they may think proper.

Article V of the treaty reads:

> It is hereby declared to be the intention of the parties hereto, that equal rights and privileges shall pertain to both Choctaws and Chickasaws to settle in whatever district they may think proper, and to be eligible to all the different offices of the Choctaw Nation, and to vote on the same terms in whatever district they may settle, except that the Choctaws are not to vote *in any wise* for officers in relation to the residue of the Chickasaw fund.

This treaty pursuant to its terms was approved by the President and the Senate of the United States. After the Chickasaw Indians had moved into the Choctaw country differences arose between the two tribes concerning the boundaries of the Chickasaw district. To compose these disputes a new treaty was entered into between them on November 4, 1854 (10 Stat. 1116), in which the boundaries of the Chickasaw district were again determined and fixed, the treaty of January 17, 1837, remaining otherwise unchanged. This supplemental treaty was also assented to by the United States.

The United States and the Choctaw and Chickasaw Nations entered into a treaty on June 22, 1855 (11 Stat. 611). The purposes of the treaty, so far as they are here material, are set forth in the preamble as follows:

> Whereas, the political connexion heretofore existing between the Choctaw and the Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States: and whereas, the United States desire that the Choctaw Indians shall relinquish all claim to any territory west of the one hundredth degree of west longitude, and also to make provision for the permanent settlement within the Choctaw country, of the Wichita and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to lease, on reasonable terms, to the United States, that portion of their common territory which is west of the ninety-eighth degree of west longitude, * * *

Article 1 of the treaty, after defining the boundaries of the Choctaw and Chickasaw country by metes and bounds, provides as follows:

> And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole.

The plaintiff Indians rely largely on the provisions of Article 1 of the Treaty of 1855 in support of their contention that the moneys arising from the sale or disposition of the common properties of the Choctaw and Chickasaw tribes should have been apportioned and paid on the basis of 76.74% to the Choctaws and 23.26% to the Chickasaws. It is contended that the phrase "so that each and every member of either tribe shall have an equal, undivided interest in the whole" guaranteed that the common funds of the two tribes derived from subsequent sales or disposition of lands belonging to them in common would be disbursed without reference to the particular tribal enrollment of the Indians in such manner as would give to each and every individual member of the two tribes an equal amount of money.

We think plaintiff's contention misconstrues the intent and meaning of the language used in Article 1 of the treaty. The warranty of the lands in the said article, as stated therein, was made pursuant to the act of Congress approved May 28, 1830 (4 Stat. 411). This act was entitled "An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi." The act so far as here pertinent reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks, as to be easily distinguished from every other.
>
> SEC. 2. *And be it further enacted*, That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the states or territories, and with which the United States have existing treaties, for the whole or any part or portion of the territory claimed and occupied by such tribe or nation, within the bounds of any one or more of the states or territories, where the land claimed and occupied by the Indians, is owned by the United States, or the United States are bound to the state within which it lies to extinguish the Indian claim thereto.
>
> SEC. 3. *And be it further enacted*, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: * * *

The explicit language of this act makes it clear that in the exchange of lands with Indian tribes or nations the dealings contemplated were with Indian tribes and nations in their political capacities and not with the individual members of the tribes or nations. Likewise the assurance, which the President in section 3 of the Act was authorized to make, to the tribe or nation with which an exchange was made that the United States would forever "secure and guaranty to them, and their heirs or successors, the country so exchanged with them", was to be made to the tribe or nation as a political entity, rather than to the individual members of such tribe or nation. The warranty in Article 1 of the treaty of 1855 in which the United States forever secured and guaranteed the lands embraced in the Choctaw and Chickasaw country to the members of such tribes, their heirs or successors, to be held in common "so that each and every member of either tribe shall have an equal, undivided interest in the whole" was made pursuant to the act of May 28, 1830, and must be considered and construed in connection with its provisions.

The intent and meaning of the phrase "so that each and every member of either tribe shall have an equal, undivided interest in the whole" must also be considered in connection with the other articles of the treaty of 1855, and the purposes sought to be attained by the parties in making it.

The primary reasons and purposes for making the treaty as stated in the preamble were twofold:

First. "Unhappy and injurious dissensions and controversies" had arisen between the Choctaws and Chickasaws because of their "political connection", which rendered a readjustment of their relations to each other and to the United States necessary.

Second. The desire of the United States that the Choctaw Nation release all claims to any territory west of the one-hundredth degree of west longitude, and also to make provision for the permanent settlement within the Choctaw country of certain other bands or tribes of Indians.

The exact nature of the dissensions and controversies that had arisen between the Choctaw and the Chickasaw Nations

which made a readjustment of their relations to each other and to the United States necessary does not appear. However, it is clear that they arose because of the unsatisfactory political connection between them created by the treaty of 1837. The troubles, whatever they may have been, were of a political nature and concerned the rights and obligations of the tribes as separate and distinct political entities. They were regarded and treated as separate and distinct political entities in the treaty of 1855 and their relationship to each other and to the United States was readjusted and fixed on that basis, as clearly appears from following provisions of the treaty.

Article 4 provided that the government and laws then in operation, and not incompatible with the treaty, should remain in full force within the limits of the Chickasaw district, until the Chickasaws should adopt a constitution.

Article 5 secured to members of each tribe the right to freely settle within the jurisdiction of the other, and have all the rights, privileges, and immunities of citizens thereof, except that no member of either tribe should participate in the funds belonging to the other tribe.

Article 6 provided for the surrender of fugitives from justice of either tribe.

Article 7 secured to each tribe the unrestricted right of self-government, and, with certain exceptions not material here, full jurisdiction over persons and property within their respective limits.

The political connection existing between the Choctaw and Chickasaw Nations as a result of the treaty of 1837 was dissolved and discontinued by the foregoing provisions of the treaty of 1855 and each of the two tribes again became a single and separate political entity in every respect, and the political relationship of the two Nations to each other and to the United States was determined and readjusted on that basis. When Article 1 of the treaty of 1855 is considered together with these provisions of the treaty, as well as with section 3 of the act of 1830, it seems clear that the lands secured and guaranteed to the members of the Choctaw and Chickasaw tribes by that article became the common property of the said tribes in their separate corporate capacity,

and that the phrase "so that each and every member of either tribe shall have an equal, undivided interest in the whole" has reference solely to the use and occupancy of the land and not to an equal, undivided interest in moneys arising from the sale or other disposition of the lands. This conclusion seems inescapable when consideration is had of succeeding articles in the same treaty where funds arising from the disposition of common properties of the tribes are specifically dealt with and are apportioned and paid on an entirely different basis.

The second primary purpose of the treaty of 1855, as heretofore pointed out, was to secure the relinquishment by the Choctaw Nation of lands claimed west of the one-hundredth degree of west longitude, and also the making of provisions for the permanent settlement of other Indian tribes within the limits of the Choctaw country. This purpose was attained by Articles 9 and 10 of the treaty. By Article 9 it was provided:

> The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in, and to any and all lands, west of the one-hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; excluding, * * * *Provided, however*, the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

The amount to be paid by the United States to the Choctaw and Chickasaw Nations in consideration of the foregoing relinquishment and lease of their common lands was fixed in Article 10 of the treaty, as was the manner in which such moneys should be apportioned and paid to the respective tribes:

> In consideration of the foregoing relinquishment and lease, and, as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand

dollars, in such manner as their general councils shall respectively direct.

Thus the Choctaw and Chickasaw Nations agreed with the United States that the moneys arising from the relinquishment and lease of their common lands should be apportioned and paid on the basis of three-fourths to the Choctaws and one-fourth to the Chickasaws. Not only that, but it is highly significant that the moneys were to be paid to the Choctaws and Chickasaws in such manner as their general councils shall respectively direct, thus showing that the United States in this agreement was dealing with the tribes in their corporate capacities as separate and distinct political entities, and not with their individual members. When it is considered that the United States, in negotiating the treaty of 1855, at all times recognized the Choctaws and Chickasaws as separate and distinct political entities, and dealt with them on that basis, in readjusting their political relations to each other and to the United States, and also in securing a relinquishment and lease of their lands and paying for the same, there is no conflict between Articles 1 and 10 of the treaty. The guaranty in Article 1 of the treaty in respect to the lands held in common by the two tribes had reference solely to the use and occupancy of the lands while so held, while Article 10 dealt directly with moneys arising from the disposition of the lands, and established a definite basis for the apportionment and payment of the moneys, three-fourths to the Choctaws and one-fourth to the Chickasaws.

The basis fixed and agreed upon in Article 10 of the treaty of 1855 for the apportionment and payment of the moneys arising out of the disposition of the common property of the Choctaw and Chickasaw Nations, in proportion of three-fourths to the Choctaws and one-fourth to the Chickasaws, was restated and reaffirmed in the treaty of April 28, 1866, 14 Stat. 769, to which both the Choctaw and Chickasaw Nations were parties. In Article 3 of this treaty the Choctaws and Chickasaws in consideration of the sum of $300,-000 ceded to the United States the territory west of the 98th degree west longitude which had been leased to the United

States by the Indians in the treaty of 1855. It was provided:

> * * * the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three-fourths to the former and one-fourth to the latter. * * *

By Article 30 it was provided:

> The Choctaw and Chickasaw Nations will receive into their respective districts east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians * * * who shall have in the Choctaw and Chickasaw Nations, respectively, the same rights as the Choctaws and Chickasaws, * * * with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same or the proceeds thereof be divided per capita among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws * * *

By Article 33 it was provided:

> All lands selected as herein provided shall thereafter be held in severalty by the respective parties, and the unselected land shall be the common property of the Choctaw and Chickasaw nations, in their corporate capacities, subject to the joint control of their legislative authorities.

By Article 37 it was provided:

> In consideration of the right of selection hereinbefore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre, to be divided between the said nations in the proportion of one-fourth to the Chickasaw nation, and three-fourths to the Choctaw nation * * *

By Article 46 it was provided:

> Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas

Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws * * *

Articles 3 and 37 deal directly with the apportionment and payment of moneys arising from the disposition and management of the common properties of the Choctaw and Chickasaw Nations and fix the basis of such apportionment and payment in the proportion of three-fourths to the Choctaws and one-fourth to the Chickasaws, as did Article 10 of the treaty of 1855. Article 30 fixes the basis on which the Choctaw and Chickasaw Nations will receive, into their respective districts, other Indian tribes, which under preceding provisions of the treaty they had agreed might settle among them. The basis on which other Indians were to be received was likewise in the proportion of three-fourths in the Choctaw Nation and one-fourth in the Chickasaw Nation, which provision is particularly significant of the understanding of the parties as to the proper basis for the apportionment and payment of moneys arising from the disposition of their common properties. The declaration in Article 33 that the remaining lands "shall be the common property of the Choctaw and Chickasaw Nations, in their corporate capacities, subject to the joint control of their legislative authorities", refutes the plaintiff's contention that Article 1 of the treaty of 1855 vested in each and every member of either tribe an equal, undivided interest in the common lands of the two tribes, and a like interest in all proceeds arising from the sale or disposition otherwise of such lands.

The basis agreed upon and fixed in the treaties of 1855 and 1866 for the apportionment and payment of moneys arising from the disposition of the common properties of the Choctaw and Chickasaw Nations under those treaties, in the proportion of three-fourths to the former and one-fourth to the latter, has since been adopted and consistently followed by the legislative and executive branches of the Government in the apportionment and payment of all moneys similarly arising.

The act of Congress of August 2, 1882, 22 Stat. 181, granted to the St. Louis and San Francisco Railroad a right-

of-way for a railroad and telegraph line through the Choctaw and Chickasaw lands for which the railroad company was to pay quarterly to the national treasurer of the said Nation, for the benefit of schools therein, seven hundred and fifty dollars, "one-fourth of said payments to be paid to the Chickasaws and three-fourths to be paid to the Choctaws."

Section 4 of this Act provided:

> * * * if the general councils of the Choctaw and Chickasaw Nations, or either of them, shall within sixty days after the passage of this act, by resolution duly adopted, dissent from the allowance provided for in this section, and shall certify the same to the Secretary of the Interior, then the compensation to be paid for the use and grants in this act made for such dissenting tribe shall be determined * * *.

Many other acts of Congress gave railroad companies the right to acquire lands for rights-of-way and station grounds over the lands of the Choctaw and Chickasaw Nations. It was provided in these acts, the language being identical in all of them, that

> The money paid to the Secretary of the Interior under the provisions of this act shall be apportioned by him in accordance with the laws and treaties now in force between the United States and said nations and tribes. * * *

The moneys received by the Secretary of the Interior under the provisions of these acts were apportioned and paid to the Choctaw and Chickasaw Nations in the proportion of three-fourths to the Choctaws and one-fourth to the Chickasaws. So far as the record shows neither of the Nations ever raised any question in respect to the apportionment and payment of the moneys to them, indicating clearly that they considered that basis of apportionment and payment to be in accordance with the laws and treaties then in force between them and the United States, as it unquestionably was.

The Indian Appropriation Act of March 3, 1891, 26 Stat. 989, 1025, contained the following provision:

> And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be, and

> the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in, and to certain lands now occupied by, the Cheyenne and Arapahoe Indians under executive order; * * * three-fourths of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such time and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Chickasaw Nation; * * *

The General Council of the Choctaw Nation by formal Act on April 9, 1891, made requisition for its three-fourths part of the said appropriation, $2,243,587.50.[1] The legislature of the Chickasaw Nation by formal Act on April 1, 1891, made requisition for its one-fourth part of the appropriation, $747,862.50.[2]

Thus the two Nations, through Acts of their national legislatures, in a matter involving vast sums of money, sol-

[1] An act making requisition for the sum of $2,243,587.50, due the Choctaw Nation under an act of Congress approved March 3, 1891.

*Be it enacted by the general council of the Choctaw Nation assembled*, That the delegation of 1889, the national treasurer of the Choctaw Nation, and some one to be selected by the principal chief, with the advice and consent of the senate, are hereby authorized and directed to proceed to Washington, D. C., and make a requisition on the Government of the United States in such manner and form as may be satisfactory to the proper authorities of the United States for the sum of $2,243,587.50, being three-fourths of the sum of $2,991,450 appropriated by the act of Congress of the United States, approved March 3, 1891, in payment of the interest of the Choctaw and Chickasaw Nations in the lands west of 98th degree of west longitude.

[2] An act to comply with the requirements of the act of Congress, approved March 3, 1891, making an appropriation to compensate the Choctaws and Chickasaws for their interest in the lands lying south of the Canadian River, now occupied under executive order by the Cheyenne and Arapahoe Indians * * *.

*Now, therefore, be it enacted by the legislature of the Chickasaw Nation*, That Benjamin F. Byrd, treasurer of the Chickasaw Nation be, and he hereby is, authorized to receive, on behalf of the Chickasaw Nation, the sum of seven hundred and forty-seven thousand eight hundred and sixty-two dollars and fifty cents, being one fourth part of the amount appropriated in said act of Congress to compensate the Choctaw and Chickasaw nations for their interest in the lands lying south of the Canadian River and now occupied, under executive order, by the Cheyenne and Arapahoe Indians.

—(Senate Executive Document No. 42, 52nd Congress, 1st Session.)

emnly ratified and reaffirmed the basis established in the treaties of 1855 and 1866, and running thereafter through numerous acts of Congress, as the proper and legal basis for the apportionment and payment of moneys arising from the disposition of their common properties, three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation.

The act of June 10, 1896, 29 Stat. 321, provided for the location of absentee Wyandotte Indians upon the lands of the Choctaw and Chickasaw Nations in accordance with the provisions of the treaty of 1866. Twenty one thousand six hundred eighty six dollars and eighty cents was provided for the payment to the Choctaw and Chickasaw Indians as compensation for the lands thus taken and used. In reference to the apportionment and payment of such moneys it was provided:

> * * * which said fund shall be paid to the National treasurers of the Choctaw and Chickasaw Nations in the proportions of three-fourths to the former and one-fourth to the latter * * *.

The basis for the apportionment and payment of moneys arising from the disposition of the common properties of the Choctaw and Chickasaw Nations, in the proportion of three-fourths to the former and one-fourth to the latter, was definitely fixed in Article 10 of the treaty of 1855, Articles 3 and 37 of the treaty of 1866, and numerous acts of Congress. Immense sums of money were apportioned and paid to the respective tribes on that basis. For a period of almost sixty years following the treaty of 1855 the Choctaw Nation received its proportionate share of such moneys, at no time challenging in any way the correctness of the basis on which the payments were made. At all times prior to 1898 this was the established and accepted legal basis for the distribution of all common funds of the two tribes. Unless this basis was changed by the agreements and acts of Congress under which the moneys here involved were collected and distributed it remained and was the legal basis for the apportionment and payment of such moneys.

The act of March 3, 1893, 27 Stat. 612, provided for the appointment of commissioners to enter into negotiations with the five civilized tribes, comprising the Cherokee

Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee or Creek Nation and the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to their lands in Indian territory, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes respectively entitled to the same or such other method as might be agreed upon between the several nations, or each of them with the United States, with a view to such an adjustment, upon the basis of justice and equity, as might be necessary and suitable to enable the ultimate creation of a state or states of the union embracing the lands of the said nations or tribes. Pursuant to this Act, and to accomplish the purposes therein stated, the Commissioners of the United States (The Dawes Commission) negotiated an agreement with the Choctaw and Chickasaw Nations on April 23, 1897. This treaty, known as the "Atoka Agreement", was incorporated in the act of June 28, 1898, 30 Stat. 495, as section 29 thereof. The "Atoka Agreement" was followed and superseded by an agreement entered into by the same parties on March 21, 1902, 32 Stat. 641.

Section 29 of the act of June 28, 1898, provides:

> That all lands within the Indian territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

No provision is made in the agreement for the sale or disposition of the lands remaining after allotments had been made to individual members of the tribes.

It was further provided:

> All coal and asphalt in or under the lands allotted and reserved from allotment shall be reserved for the sole use of the members of the Choctaw and Chickasaw tribes, exclusive of freedmen,

and that

> It is agreed that all the coal and asphalt within the limits of the Choctaw and Chickasaw Nations shall remain and be the common property of the members of

the Choctaw and Chickasaw tribes (freedmen excepted), so that each and every member shall have an equal and undivided interest in the whole.

In respect to town sites it was provided in the agreement that "* * * there shall be appointed a commission for each of the two Nations", and that

> The money paid into the United States Treasury for the sale of all town lots shall be for the benefit of the members of the Choctaw and Chickasaw tribes (freedmen excepted), and at the end of one year from the ratification of this agreement, and at the end of each year thereafter, the funds so accumulated shall be divided and paid to the Choctaws and Chickasaws (freedmen excepted), each member of the two tribes to receive an equal portion thereof.

Section 15 of the Act also deals with the question of town sites and provides:

> That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek, and Cherokee tribes, * * *,

and in reference to moneys derived from the sale of town lots provides:

> And all such moneys shall, when titles to all the lots in the towns belonging to any tribe have been thus perfected, be paid per capita to the members of the tribe.

Section 16 makes it unlawful for any person, except as otherwise provided in the Act, to claim, demand, or receive for his own use or for the use of any one else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any kind of property whatever, or any rents on any lands or property belonging to any one of said tribes or nations, and provides that:

> All royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the treasury of the United States to the credit of the tribe to which they belong.

The agreement of 1902 contains detailed provisions for the enrollment of the Choctaw and Chickasaw Indians and their freedmen, and for the allotment of land to them in severalty, for the sale of the residue of their lands, after

the equalization of allotments had been made, and the per capita distribution of the moneys arising therefrom. In section 14 it is provided:

> When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes.

Sections 56 to 63, inclusive, relate to the sale of coal and asphalt deposits and the per capita distribution of the proceeds thereof. In section 56 it is provided:

> At the expiration of two years after the final ratification of this agreement all deposits of coal and asphalt which are in lands within the limits of any town site established under the Atoka agreement, or the act of Congress of May 31, 1900, or this agreement, and which are within the exterior limits of any lands reserved from allotment on account of their coal or asphalt deposits, as herein provided, and which are not at the time of the final ratification of this agreement embraced in any then existing coal or asphalt lease, shall be sold at public auction for cash under the direction of the President as hereinafter provided, and the proceeds thereof disposed of as herein provided respecting the proceeds of the sale of coal and asphalt lands.

Section 59 provides for the disposition of the proceeds arising from the sale of coal and asphalt lands as follows:

> The proceeds arising from the sale of coal and asphalt lands and coal and asphalt deposits shall be deposited in the Treasury of the United States to the credit of said tribes and paid out per capita to the members of said tribes (freedmen excepted) with the other moneys belonging to said tribes in the manner provided by law.

Section 64 provides for the laying out of the White Sulphur Springs reservation and for payment for the lands so taken. It also provides:

> And such moneys shall, upon the dissolution of the tribal governments, be divided per capita among the

members of the tribes (freedmen excepted), as are other funds of the tribes.

The foregoing are the only provisions of the agreements of 1898 and 1902 bearing directly on the matter of the apportionment and payment of the moneys involved. With a single exception, to be subsequently considered, the moneys were to be "paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes", or "deposited in the Treasury of the United States to the credit of said tribes * * * and paid out per capita to the members of said tribes * * * with other moneys belonging to said tribes in the manner provided by law." The moneys were to be credited and paid out as other funds of the tribes. For almost fifty years, as we have seen, all moneys arising from the disposition of their common properties had been credited to the respective tribes in the proportion of three-fourths to the Choctaws and one-fourth to the Chickasaws. This basis for the apportionment and payment of their common funds had been fixed in the treaties of 1855 and 1866 and in numerous acts of Congress, and was undoubtedly the "manner provided by law" for the crediting and payment of the funds. When, therefore, it was stated in provision after provision that these funds be credited and paid "as other funds of the tribes" or "in the manner provided by law" it was intended by the parties to the agreements that the existing and long established basis of apportionment and payment of such moneys be not changed or altered in any respect. The two Nations knew the basis on which their common funds had been apportioned and paid to them for a half century, and had the parties to these agreements intended to change such basis, and provide another, in respect to the funds in question they would undoubtedly have expressed such intention in clear and unmistakable terms.

The exception mentioned is the provision appearing in the 1898 agreement that the moneys arising from the sale of town sites "shall be divided and paid to the Choctaws and Chickasaws (freedmen excepted), each member of the two tribes to receive an equal portion thereof." This provision relates solely to town site moneys, which constitute a minor portion of the funds in controversy, and

under no conceivable construction can be held applicable to the apportionment and payment of moneys arising from other sources. Furthermore, the town site and other provisions of the agreement of 1898 were superseded by the act of May 31, 1900, 31 Stat. 221, and the agreement of 1902, under which the Government thereafter acted in matters relating to the sale or other disposition of the lands and common properties of the two Nations.

The proportional interest of the two tribes in moneys arising from the disposition of their common properties, as fixed in preceding treaties and acts of Congress on the basis of three-fourths to the Choctaws and one-fourth to the Chickasaws, was in no way changed in the agreements of 1898 and 1902. That was the legal basis for the apportionment and payment of the moneys involved in suit. The United States apportioned and paid such moneys to the respective Nations on that basis. Consequently the plaintiff, the Choctaw Nation, has no legal complaint against either the United States or the Chickasaw Nation, and the petition must be dismissed.

It is so ordered.

WHALEY, *Judge*; LITTLETON, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

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## GEORGE A. THARP, TRUSTEE IN BANKRUPTCY OF O. L. BARTLETT, A BANKRUPT, v. THE UNITED STATES

[No. L-443. Decided April 6, 1936]

*On the Proofs*

*Compensation for destruction of buildings; implied contract.*—Where a city contributed to the Government for use in levee improvement for flood control, land upon which were located, at sufferance of the city, buildings of the plaintiff; and the Government, after the buildings had been stripped and abandoned by plaintiff in contemplation of such levee improvement work, demolished the buildings without making any use of them or of the materials of which they were constructed, there was no implication of an agreement on the part of the Government to pay the plaintiff for such structures.

Reporter's Statement of the Case

*Estoppel.*—It is well settled that one who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing him in the expectations upon which he acted; and where the plaintiff, by his implied agreement and conduct led the Government officers to believe that he acquiesced in their proposed action and expected no compensation from the Government on account thereof, he is estopped from claiming compensation on account of such action.

*The Reporter's* statement of the case:

*Mr. C. S. Miller* for the plaintiff.

*Mr. P. M. Cox,* with whom was *Mr. Assistant Attorney General James W. Morris,* for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is the trustee in bankruptcy of the estate of O. L. Bartlett, a bankrupt, having been duly appointed as such trustee since the beginning of this action. O. L. Bartlett is for convenience referred to hereinafter as the plaintiff.

2. The city of Mound City, State of Illinois, has continuously been for more than 75 years and is now in lawful possession and control of two parcels of land comprising part of a larger tract constituting the Ohio River water front of and controlled by the city of Mound City. These two parcels are designated herein, for the purpose of identification as (1) the "hamper plant area" and (2) "building J area."

3. On December 22, 1903, there was executed by and between the city of Mound City and Williamson-Kuny Mill & Lumber Company an agreement of lease, whereby the city leased to the company for 25 years the hamper plant area. Among other things the lessee agreed to erect and operate thereon a steam saw mill for the manufacture of lumber and other materials that would require for the running thereof at least 25 men for at least nine months each year during the continuance of the lease, and it was stipulated that in case of failure to operate the saw mill an average of at least nine months a year, employing at least 25 persons in the operation of same, the city council might declare a forfeiture of the lease at its option.

A copy of the lease is incorporated in the agreed statement of facts filed in this suit and is made part of these findings by reference.

Subsequently the Williamson-Kuny Mill & Lumber Co. went out of existence and was succeeded in its business by Williamson & Kuny, a copartnership. The company and its successors, the copartnership, erected certain buildings on and occupied the hamper plant area and operated thereon a lumber business until December 1, 1923, when the copartnership, by a bill of sale, a copy whereof is attached to the agreed statement of facts as annex I and made part hereof by reference, for a consideration of $1,500, sold, transferred, and assigned their property rights in and to said buildings and under said lease to plaintiff, O. L. Bartlett, who thereafter and until the levee extension and improvement work hereinafter mentioned was undertaken, occupied the said premises and conducted thereon a hamper or crate manufacturing business.

The city of Mound City was informally advised of the transfer to plaintiff, and accepted plaintiff as tenant of the premises in the place and stead of the copartnership until December 23, 1928, when the lease expired.

After the expiration of the lease the city of Mound City permitted the plaintiff to occupy the premises, and no rental was paid by plaintiff to the city of Mound City.

**4.** For some years prior to 1913 and for some time thereafter plaintiff conducted also a hoop manufacturing business in the city of Mound City on premises lying between East First Street, East Second Street, Commercial Avenue, and the Ohio River Front Levee. These premises will be termed the "hoop plant area."

**5.** On March 3, 1913, the city council of the city of Mound City passed resolutions purporting to lease to plaintiff, at an annual rental of one dollar, the premises referred to in finding 2 as "Building J Area", which was a strip of land on the water front 50 feet by 255 feet, for the stated purpose of erecting a warehouse or warehouses thereon, for 20 years from March 3, 1913, the building to be erected for manufacturing purposes, the lease to terminate upon plaintiff's ceasing to use the land for those purposes.

Following the passage of these resolutions plaintiff occupied Building J Area until the levee extension work hereinafter mentioned was undertaken. No rental was paid by plaintiff to the city of Mound City in consideration of the use and occupancy of Building J Area, and no formal agreement in respect to said strip of land was signed or executed by and between plaintiff and the city.

The resolutions of March 3, 1913, are set forth verbatim in the agreed statement of facts, and as so set forth are made a part of these findings by reference.

**6.** Neither the agreement of lease executed by and between the city of Mound City and Williamson-Kuny Mill & Lumber Co., the bill of sale and assignment of lease by Williamson & Kuny to the plaintiff, the resolutions of the city council of March 3, 1913, nor any instrument in relation to any of the said transactions was made a matter of record in the office of recorder as provided for by the laws of the State of Illinois.

**7.** The Congress in 1928, passed "An act for the control of floods on the Mississippi River and its tributaries and for other purposes", which was approved May 15, 1928, 45 Stat. 534. By the said act there was approved and adopted the project for flood control of the Mississippi River and its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau in accordance with the plan, known as the "Jadwin plan", recommended by the Chief of Engineers under date of December 1, 1927, which is set out and printed in House Document No. 90, Seventieth Congress, first session, and included levee strengthening and extension work at the city of Mound City, State of Illinois.

**8.** Following passage of the Flood Control Act of May 15, 1928, the Engineer Corps of the United States Army, under the direction of the Chief of Engineers, made detailed plans for the flood-control work authorized and provided by the act. Among such plans were the plans and specifications for levee strengthening and extension at Mound City, Illinois.

On or about March 14, 1929, there was forwarded to and duly received by the mayor of the city of Mound City a

letter from the district engineer, U. S. Engineer Office, Memphis, Tenn., the material parts of which are as follows:

> 1. In accordance with the provisions of the Flood Control Act of May 15, 1928, the United States proposes to strengthen the Ohio River front levee at Mound City, by placing an enlargement on the river side of the present levee from station 103–44 to station 152–12, and from there on, cross over and place the enlargement on the land side to about station 170–50, at which point the enlargement work will stop. * * *
>
> 2. Under the terms of this act, you will be required to furnish rights-of-way for this enlargement, for the wastage of undesirable material, and for the borrow pits from which the material for the enlargement will be obtained, and rights-of-way for free access to the work, both to the United States and any contractor to whom the work may be let, free of cost to the United States. In order to go ahead with the plans for this work, it is necessary that you give us at this time assurance that these rights-of-way will be furnished by April 15, free of all public or private rights which might in any way interfere with the rapid prosecution of this work.
>
> 3. * * * It is the duty of the local cooperating interests to clear the levee of these obstructions [referring to obstructions within the levee limits] by modification, abandonment, or removal, or to secure from the owner thereof a permit to construct the embankment under and around such obstructions, where practicable, without interference with or hindrance to the progress of the work, or detrimental to the levee. * * *
>
> It is hoped the work contemplated may be advertised about April 15, but before this can be done the definite assurance called for above must be in my hands. Therefore, in order to facilitate the work, you are requested to expedite this matter as much as possible.

A copy of this letter is embodied in the agreed statement of facts and is made part hereof by reference.

**9.** On April 2, 1929, the city council of the city of Mound City adopted resolutions purporting to adopt the plans and specifications, elevations, and grades established by the United States Government in the proposed enlargement and improvement of the Ohio River front levee in Mound City, and resolving to "lend all aid and help necessary to carry the said proposed plans to a successful conclusion."

A copy of these resolutions is included in the agreed statement of facts and made part hereof by reference.

10. On or about April 9, 1929, there was received by the mayor of the city of Mound City a letter from the district engineer at Memphis, Tenn., stating that the work on the Mound City Levee had been approved by the Chief of Engineers, and urging prompt furnishing of the assurances requested in his letter of March 14, 1929.

11. On April 11, 1929, in response to the communications from the district engineer the mayor of the city of Mound City wired the district engineer at Memphis as follows:

> Your letter April 9th. Arrangements have been made for right-of-way and borrow pits for proposed work on Mound City levee.

12. On April 12, 1929, the mayor of the city of Mound City wrote the district engineer at Memphis as follows:

> Replying to your letters of March 14th and April 9th regarding right-of-way requirements in connection with proposed work on our front-line levee.
>
> We beg to advise that we have secured the necessary borrow pits and rights-of-way for this work, and will furnish same in accordance with plans submitted, except that we would like to substitute a concrete paving on the levee at the Swisshelm Veneer Company plant, approximately between stations 107–75 and 110–50. This pavement to be provided with a cut-off wall to extend five feet into the impervious strata underlying the existing levee. It is requested that if this change is approved, plans therefor be drawn by the district engineer. The difference in the cost of this work to be paid by the city and a deposit will be made with you to cover the additional cost before the work is started.
>
> It is also desired that the shed on top and outside of the present levee at the plant of O. L. Bartlett be left, or at least the top of this be left, the lower floor removed for filling, if you find this practical. We are also desirous of having the O. L. Bartlett hamper plant left intact, or as nearly so as is possible. We are anxious to have these plants left, or as much of them left as is possible. We need all of the industry we have. We are not sure whether or not either of the above will

> be practical but if your engineers find it can be done we will be glad to have it, otherwise we have arranged for their removal.

The shed referred to is hereinafter designated "Structure J."

**13.** On the same day, to wit, April 12, 1929, the city council of the city of Mound City adopted resolutions, the portion thereof relating to the matter in suit being as follows:

> Whereas the levee enlargement plans for the Ohio River Front Levee in Mound City, Ill., heretofore adopted by the City Council of Mound City, call for the removal of buildings owned by O. L. Bartlett,
>
> Whereas the City of Mound City is desirous of helping defray the expenses of said removals,
>
> *Therefore, Be It Resolved* by the City Council of the City of Mound City, that an amount equal to one percent (1%) of the annual pay roll of the O. L. Bartlett Hoop Mill for the year 1928, be paid to the said O. L. Bartlett Hoop Mill to be applied to the expenses of moving such buildings as are required to be moved; and that said amount be paid in four equal annual installments, the first payment to be made the first day of October 1929.

No payments to plaintiff were made pursuant to these resolutions.

**14.** The levee construction work at Mound City, Illinois, was on April 29, 1929, duly advertised, and bids were opened May 22, 1929; the contract for the work was signed under date of June 20, 1929; it was on August 2, 1929, approved by the Chief of Engineers; and soon thereafter the work of levee extension and improvements on the waterfront of the city was begun. The work was completed in accordance with the plan for flood control during the latter part of the year 1930.

**15.** Located within the right-of-way of the above-mentioned levee enlargement and extension work, and on lands belonging to the city of Mound City, plaintiff owned the following structures:

(1) A logging incline used in connection with plaintiff's hoop mill, extending from the sawmill to the river edge, located in the hoop mill area, and designated "Structure H."

(2) A one-story wooden building approximately 13 feet by 35 feet, used as an office in connection with plaintiff's hoop mill, located in the hoop mill area, and designated "Structure I."

(3) An open frame lumber storage shed, approximately 50 feet by 170 feet, used in connection with both the plaintiff's hoop mill and his hamper plant, located in building J area, and designated "Structure J."

(4) The hamper plant, located in the hamper plant area, designated "Structure N", consisting of:

(a) A two-story frame building, approximately 20 feet by 112 feet, together with a two-story annex of approximately 15 feet by 48 feet; two one-story enclosed shed roof annexes, one approximately 16 feet by 82 feet and the other 20 feet by 20 feet; a one-story corrugated iron covered boiler house annex 8 feet by 30 feet; and a one-story open frame shelter annex, approximately 15 feet by 30 feet.

(b) A two-story building, approximately 115 feet by 36 feet which was connected by a platform to the 20-foot by 112-foot building above mentioned and to which were attached a 16-foot by 60-foot two-story frame galvanized iron covered annex; a 26-foot by 40-foot one-story frame annex; and two one-story frame annexes, one 16 feet by 38 feet and the other 12½ feet by 50 feet.

(c) Attached integrally to and forming an ell with the 115-foot by 36-foot building mentioned above a two-story frame storage building, approximately 100 feet by 36 feet, to which were attached a two-story frame annex of approximately 23 feet by 44 feet, and a one-story frame annex, approximately 21 feet by 32 feet.

(5) A two-story frame building 14 feet by 61 feet with two ells, 14 feet by 14 feet, each at one time used as an office and residence, but which for some time prior to the summer of 1929 had been let by plaintiff as a dwelling house to a tenant, located in the hamper plant area, and designated "Structure O."

(6) An old brick building, formerly used as a boiler house, approximately 43 feet by 43 feet, located in the hamper plant area, and designated "Structure P."

16. Before the inception of the levee work plaintiff was informed by defendant's officers and understood that some of his buildings on the site of the new levee would have to be demolished.

Among the clauses of the contract between the defendant and its contractor covering the levee extension and improvements at Mound City was the following provision:

> It is the intent to have all obstructions objectionable to the contracting officer removed from the area within the base of the new embankment without expense to the contractor, and in ample time to avoid any delay in the execution of the work, except such obstructions as the contractor may be required to remove under the contract, a list of which will be furnished bidders.

In preparing the information for bidders in accordance with this provision Clyde M. Hogue, assistant engineer and works inspector, for the defendant, made an investigation of the structures and other obstructions located within the right-of-way of the levee extension and improvements and, early in May 1929, called upon plaintiff, among others, and discussed with him the removal or demolition of such structures as were in the way of the levee extension. In conversations between plaintiff and Clyde M. Hogue plaintiff agreed, (1) at his expense, to raise the log incline, designated "Structure H", to levee grade, and if possible to keep his mill operating during construction; (2) at his expense, to have moved over to land side of levee the office building, structure I; (3) at his expense, to have structure J, the storage shed, stripped of all material of value to him, the remainder of the shed to be left for the Government contractor or anyone who might have use therefor; (4) at his expense, to have stripped of all machinery and other materials of value to him, mill sheds designated "Structures N, O, and P", the remainder thereof to be left for the Government contractor or anyone else who might have use for them.

Inspector Hogue made an official report of this oral understanding to his superior officer May 11, 1929.

Reporter's Statement of the Case

**17.** During the progress of the levee extension and improvement work plaintiff raised the logging incline, structure H, to the new levee grade, and at the beginning of this action it was still utilized in connection with the hoop mill.

Before the levee work reached the premises occupied by the hoop mill, plaintiff, during the latter part of August 1929, moved structure I, the office building, a distance of about 100 feet from the river side to the land side of the levee. At the beginning of this action it was still in use as an office in connection with the hoop mill.

It was impracticable to leave the lumber storage shed, structure J, for the reason that it was located wholly within the area occupied by the new embankment, and the necessary foundations for it, even if the lower floor had been removed as suggested in letter of April 12, 1929 (Finding 12), would have eventually endangered the integrity of the levee structure. It was demolished by or under the direction of the Government contractor.

The group of connected structures constituting the hamper plant, designated "Structure N", came wholly within the area of the new embankment of the levee, and for the same reason in respect to structure J, it was impracticable to leave any part of them standing and they were demolished by or under the direction of the Government contractor. Before they were demolished or the levee work had reached the premises, the plaintiff, during August 1929, removed from structure N such of the machinery, fittings, fixtures, manufactured goods, and other materials as he desired.

The frame building, structure O, was let by plaintiff as a residence at the time the contract for levee work was made. The occupant later moved out and the building was vacant at the time the levee work was undertaken. The building was located wholly within the area of the embankments of the levee extension and improvements, and it was impracticable to leave it standing. It was likewise demolished by or under the direction of the Government contractor.

18. Neither the United States nor any of its officers ever occupied or otherwise made use of any of the structures mentioned in these findings of fact, or of their contents, or of the materials of which they were constructed.

19. Just compensation for a taking of the structures demolished as described in Finding 17 herein, fixed as of the year 1929, would be $10,000.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The facts in this case are set forth in detail in the special findings of fact and it is not necessary that an extensive restatement of them be made in the opinion. Briefly summarized the material facts are:

Shortly after the passage of the act of May 15, 1928 (45 Stat. 534), an act for the control of floods on the Mississippi River and its tributaries, the City Council of Mound City, Illinois, made application to the Mississippi River Commission, created under the provisions of said act, for the improvement of the levee system previously constructed for the protection of that city against the flood waters of the Ohio River. The application of the city was favorably acted upon by the Mississippi River Commission. The district engineer in charge wrote the mayor of Mound City informing him that the United States proposed to strengthen the Ohio River front levee at Mound City. He further informed the mayor that pursuant to section 6 of the Flood Control Act, the city would have to furnish free of cost to the United States all necessary rights-of-way for the contemplated improvements. Accompanying this letter was a sketch showing certain obstructions within the limits of the proposed levee enlargements, among which were the structures described in finding No. 15, owned by the plaintiff Bartlett, and located on lands in the lawful possession and control of the city.

The mayor of Mound City promptly wired the district engineer stating, "Arrangements have been made for the right-of-way and borrow pits for proposed work on Mound

City levee", and on the following day wrote the district engineer requesting that, if found practicable, the shed on top and outside the present levee at the Bartlett hoop mill be left intact, and that Bartlett's hamper plant be allowed to remain, but stated that if the government engineers found it was not practicable to allow these structures to remain along the levee, that "we have arranged for their removal." On the same day the city council adopted resolutions in which provision was made for the city to pay Bartlett one percent (1%) of the annual pay roll of the hoop mill for the year 1928, to be applied to the expenses of moving such buildings as were required to be moved. The plaintiff was not paid by the city the amount authorized to be paid to him in this resolution.

The contract for the levee improvement at Mound City was subsequently made and the work was completed in accordance with the terms of the contract and duly accepted by the United States. Before the inception of the levee work plaintiff was informed by defendant's officers that certain of his buildings on the site of the levee would have to be demolished. In conversations between the plaintiff and the assistant engineer in charge of the work, the plaintiff agreed, (1) at his expense, to raise the log incline, designated "Structure H", to levee grade, and if possible to keep his mill operating during construction; (2) at his expense, to have moved over to land side of levee the office building, structure I; (3) at his expense, to have structure J, the storage shed, stripped of all material of value to him, the remainder of the shed to be left for the Government contractor or anyone who might have use therefor; (4) at his expense, to have stripped of all machinery and other materials of value to him, mill sheds designated "Structures N, O, and P", the remainder thereof to be left for the Government contractor or anyone else who might have use for them.

During the progress of the work the lumber storage shed, designated in finding No. 15 as "Structure J", located wholly within the area occupied by the new embankment, was demolished under the direction of the government contractor.

The group of connecting structures, constituting the hamper plant, designated in the findings as "Structure N", lying wholly within the area of the new embankment of the levee, was likewise demolished by or under the direction of the government contractor, as was the frame building, "Structure O." Before these structures were demolished or the levee work had reached the premises, the plaintiff had removed from such structures all machinery, fittings, fixtures, manufactured goods, and other materials desired by him.

The United States never occupied or otherwise used the structures mentioned, or made use of any of their contents, or the materials of which they were constructed. Such materials in the buildings as may have had salvage value were removed from the premises by people residing in the locality.

The plaintiff, at the time the structures were demolished, had no lease from the city with respect to the lands on which they were located.

The question for decision is whether the United States impliedly promised to pay plaintiff the value of the structures demolished by its officers, as a taking of private property for public use. The question of the taking of a freehold is not present, as the plaintiff held no lease to the premises on which the buildings were located. The plaintiff occupied the premises by the sufferance of the city, subject to removal at any time upon reasonable notice. The facts further show that the United States never in any manner, occupied or used the structures involved, and made no use of the materials of which they were constructed. These facts rebut the implication of an agreement on the part of the United States to pay the plaintiff the value of such structures.

Moreover the plaintiff is estopped by his own conduct from asserting a claim against the Government for the value of the structures demolished by its officers. He knew months before the structures were demolished by the Government that they would have to be removed from the levee right-of-way. The city council of Mound City had adopted resolutions in April 1929 providing for the payment in part of

the cost of the removal of such of plaintiff's buildings as would have to be removed, and the plaintiff in May had agreed with the government engineer that he would remove all machinery and other materials of value from the buildings, "the remainder thereof to be left for the government contractor or anyone else who might have use for them." Pursuant to this agreement the plaintiff proceeded to remove from the buildings all machinery and other materials of value and had completed such removal before the levee work reached the premises on which the buildings were located. In these circumstances the officials of the government in charge of the work had a right to assume that the plaintiff acquiesced in the demolition of the buildings by them. He had in effect agreed that this might be done and made no protest while the work was going on. Had he not agreed that the officials of the Government might make such disposition of the buildings as they saw fit after he had removed the machinery and other articles of value therefrom, or if he had entered a protest at the time the actual work of demolition commenced, the officers of the Government no doubt would have taken the matter up with the proper officials of Mound City and required them to have the buildings removed free of cost to the Government. The plaintiff by his own agreement and conduct led the responsible officers of the Government to believe that he had elected not to remove the buildings in question from the premises on which they were located, and that he expected no compensation from the United States in respect to them. The law is well settled that one who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. *Dickerson* v. *Colgrove*, 100 U. S. 578; *Ralston Purina Co.* v. *United States*, 75 C. Cls. 525.

The plaintiff is not entitled to recover and the petition is therefore dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

# LEW W. TULLER *v.* THE UNITED STATES

[No. M–398. Decided April 6, 1936]

*On the Proofs*

*Income tax; gain or loss in transfer of property to corporation.*—The provision of section 202 of the Revenue Act of 1921 that no gain or loss shall be recognized "when a person transfers any property, real, personal or mixed, to a corporation, and immediately after the transfer is in control of such corporation", applies to transfers by *exchange* of properties, but not to transfers by *sale*.

*Statutory construction; amendment of the act to remove ambiguity.*—The fact that an act of Congress was amended to remove ambiguity and prevent a construction at variance with the intent of Congress in its enactment does not support a construction of the original act contrary to such intent of Congress.

*Statute of limitation; reconsideration of claim for refund.*—Where the taxpayer's claim for refund filed November 2, 1923, was rejected by the Commissioner of Internal Revenue and reconsideration denied on or before August 12, 1927, and the taxpayer in January 1929 again filed an application for a reopening of the claim, and in March following filed a supplemental claim, in response to which the Commissioner wrote a letter to the taxpayer explaining at length the reasons for the rejection of his claim and stating that a reopening of the claim was denied, there was no reopening or reconsideration of the claim subsequent to August 12, 1927, and suit by the taxpayer was therefore barred at the time of the filing of the plaintiff's petition, October 29, 1931.

*The Reporter's* statement of the case:

*Mr. John B. Osmun* for the plaintiff. *Mrs. Olive Payne Deering* was on the briefs.

*Mrs. Elizabeth B. Davis*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Lew W. Tuller, plaintiff, was at all times herein considered and now is a resident of the city of Detroit, State of Michigan. About 1906 he became a real estate operator. During the succeeding twenty years he bought and held real estate for investment, bought and operated hotels, and bought and sold apartment buildings in the city of Detroit.

In 1905 plaintiff purchased a building site in Detroit on which, in 1906, he erected a hotel, which he operated as Hotel Tuller until a receiver was appointed in 1929. In 1910 plaintiff added five stories to his hotel. In 1913 he made a second addition thereto, on adjoining land.

2. In 1913 the business was incorporated as "Tuller Hotel Company." Its incorporation seemed advisable when plaintiff decided to construct the second addition. He needed to borrow money. His banker insisted that the business be incorporated, as it would be more satisfactory to sell bonds of the corporation than of him individually. When incorporated, all shares of its capital stock were issued to plaintiff, except two shares which were issued in the name of two of his relatives in order to qualify them as directors. In 1914 the hotel company issued its bonds in the total sum of $650,000, of which sum $300,000 were still outstanding in 1922.

3. During 1922, the Tuller Hotel Company decided to build another addition to its hotel. Accordingly, it negotiated a $2,000,000 bond issued with the Dime Savings Bank of Detroit. At the suggestion of the bank, the hotel company purchased from plaintiff three lots, owned by plaintiff, which were adjacent to the hotel. This purchase was made in order that the three lots might be included in the properties which would secure the proposed bond issue. As soon as it acquired the three lots the company credited the plaintiff's account on its books with $500,000. The purchase of these lots was made in accordance with a resolution adopted by the hotel company which fixed the purchase price at the total of $500,000, provided that it should be paid out of the proceeds of the bond issue, and that the entire sum should be "immediately placed to the credit of Lew W. Tuller on the books, to be drawn by him at such time as funds are available from the bond issue or at his convenience." On September 23, 1922, the hotel company authorized the issue of bonds to the amount of $2,000,000, secured by all of the property of the corporation including the three lots, and sold the same. During the year 1922, the plaintiff withdrew from his account with the hotel company a total amount of $300,741.81.

4. On March 15, 1923, plaintiff filed his income tax return for the calendar year 1922. It disclosed a tax liability of

$27,660.01. The Bureau of Internal Revenue, in its assessment on said return, increased this amount to $28,222.10, which sum was on March 17, 1923, paid by plaintiff.

On November 2, 1923, plaintiff filed his claim for refund in the sum of $27,660.01, in which he set forth: (1) Nontaxability of transfer of property to the corporation of which plaintiff was sole owner, (2) dividend of $50,000 not exempt from normal tax, and (3) net loss for year 1921 to be applied against net income for year 1922.

June 2, 1924, a revenue agent made a report based on an audit of plaintiff's books which disclosed a deficiency of $3,196.07 for the calendar year 1922. The agent included as capital gain the sum of $230,000 as the profit plaintiff derived on his sale of the three lots to the Tuller Hotel Company and the cost of the lots was determined to be $270,000 and the selling price $500,000. The agent's report sustained plaintiff's claim as to the dividend of $50,000.

5. On September 10, 1924, plaintiff was advised by the Bureau of Internal Revenue that his claim for refund had been examined and that an audit had been made by a revenue agent that disclosed the correct tax liability to be $31,418.17 instead of $28,222.10, the amount assessed, and that his claim would be rejected. Shortly afterwards, the Bureau advised plaintiff of the $3,196.07 deficiency in his 1922 tax and enclosed an agreement assenting to the deficiency which agreement was executed by the plaintiff. On October 2, 1924, the plaintiff forwarded to the Bureau an affidavit in which he stated in substance that the agreement to the deficiency had been executed by him through a misunderstanding, that it was invalid and ought to be rejected by the Commissioner. In 1925 arrangements were made for a conference between the plaintiff's representative Koke and a representative of the Commissioner, at which they discussed the question of whether plaintiff derived taxable gain by the sale of the three lots to the Tuller Hotel Company, and subsequently Koke wrote the Commissioner enclosing a supplemental memorandum to which on August 3, 1925, the deputy commissioner replied in substance that the transfer in question was made for cash and that there was nothing to warrant a

change in the rulings of the Bureau. August 10, 1925, Koke on behalf of the plaintiff wired a protest against this ruling and asked for another conference which was granted. On September 15, 1925, the deputy commissioner advised the plaintiff in substance that no information had been submitted to warrant a change in the previous rulings. October 21, 1925, Koke, on behalf of the plaintiff, wrote again to the Commissioner protesting against the last ruling of the Bureau. This letter contained a long argument stating what plaintiff claimed to be the proper construction of the statute, that the taxpayer's books were kept on a cash receipts and disbursements basis and returns rendered accordingly. "Therefore, no income is taxable until received in cash." The letter concluded with the request that the final determination of the matter might be suspended until proper consideration had been extended. November 12, 1925, Koke again wrote the Commissioner stating at length what he termed "additional information with reference to the facts which I believe are misunderstood by the Unit." On November 30, 1925, plaintiff furnished the Commissioner with some additional affidavits with reference to the funds of the Tuller Hotel Company, and on March 17, 1926, the Bureau of Internal Revenue wrote the plaintiff with reference to the conference with Koke and said: "There is no change in the tax liability for 1922 or action taken on the claim." But Koke, on July 6, August 23, and August 24, 1926, presented additional memoranda as to the facts and his contentions regarding the question of profit derived from the transfer of the lots to the hotel company.

On November 26, 1926, the Commissioner wrote the plaintiff with reference to the transfer of the lots to the corporation that "after careful consideration of all the facts in this case, this office is of the opinion that the transaction in question was an outright sale, and as such, was a transaction in which the profit represents taxable income", and that, accordingly, the former action of the Bureau was sustained. January 17, 1927, Koke again wrote the Commissioner asking for a further conference, and on June 29, 1927, the Commissioner again wrote the plaintiff stating that after careful

consideration had been given to all of the data submitted there was no change in the tax liability of 1922 or the action taken upon plaintiff's claim.

Koke, however, continued in 1927 to write protests and requests for reconsideration which were denied by the Bureau. On August 12, 1927, the Commissioner wrote plaintiff a letter in which, among other things, in answer to the request of Koke that the 1922 return be reconsidered, he stated that "every consideration has been given to the information submitted in support of your contention with respect to the transaction involving the sale of certain real estate to the Tuller Hotel Company in 1922", and that "as this office is already familiar with the facts presented, the granting of a further hearing will be unjustifiable. The tax liability as determined is held to be correct, and your representative's request for reconsideration is denied."

Koke, on January 30, 1929, again filed an application for reopening of plaintiff's claim, and on March 17, 1929, plaintiff filed a supplemental claim in which he contended he should receive a refund of $31,418.17 alleging an error in assessing and collecting taxes on the profit which he had received from the transfer of the lots to the hotel company. On October 30, 1929, the Commissioner wrote plaintiff a long letter in which he set out in detail what the facts in the case were as the Bureau considered them and its interpretation of the law bearing thereon and stated in conclusion—"In view of the foregoing the requests for the reopening of the claim are denied."

6. The court finds as an ultimate fact from all of the evidence that plaintiff's claim for refund was rejected August 12, 1927, and at various dates prior thereto, and not reconsidered at any subsequent date.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

In the year 1905 plaintiff became the owner of a building site in the city of Detroit, on which, in 1906, he erected a hotel and to this building several additions were made from time to time. In 1913, the plaintiff desired to construct an addition to the hotel and needing money for that purpose created

a corporation, named the Tuller Hotel Company, to which the hotel property was transferred. All the capital stock of this corporation was issued to plaintiff except two shares that were issued in the name of two of his relatives to qualify them as directors. In 1914, the hotel company issued its bonds in the total sum of $650,000, of which $300,000 were still outstanding in 1922 when it was desired to build still another addition to the hotel. Additional funds were needed for that purpose and arrangements were made with the Dime Savings Bank of Detroit whereby a loan of $2,000,000 was obtained by the corporation upon a bond issue of that amount. In order to obtain this loan the hotel company purchased from plaintiff three lots owned by him which were adjacent to the hotel and included in the properties which secured the payment of this bond issue. The purchase was made pursuant to a resolution adopted by the corporation providing for the purchase of these lots for the total sum of $500,000, for the payment of the lots from the proceeds of the bond issue, and for crediting the plaintiff on the books of the corporation with the price of the lots. Subsequently and during the year 1922 the plaintiff withdrew from his account with the corporation various sums totaling $300,741.81.

Plaintiff's income tax return for the calendar year 1922 disclosed a tax liability of $27,660.01. The Bureau of Internal Revenue assessed $28,222.10 on the return which was paid by plaintiff. On November 2, 1923, plaintiff filed a claim for refund in the sum of $27,660.01 in which, among other things, he stated as the basis of his claim "nontaxability of transfer of property to corporation of which taxpayer is sole owner." In computing the tax of plaintiff for 1922, as finally determined, the Government officials included as capital gain the sum of $230,000, treating it as profit derived by the sale to the Tuller Hotel Company of the three lots to which reference has been made above, the cost of said lots being determined to be $270,000 and the selling price $500,000, and the Commissioner assessed plaintiff's taxes accordingly. Asserting that this action of the Commissioner was erroneous, plaintiff now seeks to recover the amount of taxes paid by reason thereof. More specifically stated, the plaintiff contends that under the law as it existed at the time

the lots were transferred to the hotel company there was no taxable gain in the transaction because he was the owner, and immediately thereafter in control of the corporation to which the transfer was made.

The question thus raised depends on the construction of section 202 of the revenue act of 1921 which, so far as material to the case before us, reads as follows:

> SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—
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> * * * * *
>
> (c) For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value; but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized—
>
> * * * * *
>
> (3) When (A) a person transfers any property, real, personal, or mixed, to a corporation, and immediately after the transfer is in control of such corporation, * * *.

Plaintiff takes the last clause of (c)—"no gain or loss shall be recognized"—joins it to that portion of (3) which is quoted above, and reading these two provisions together argues that they constitute a provision that no gain or loss shall be recognized in any transaction when a person transfers property to a corporation and immediately after the transfer is in control of such corporation. In other words, the plaintiff contends that these provisions apply to all transfers of every kind and description even though the transfer be a sale and not an exchange and made for cash or its equivalent.

The construction contended for by plaintiff would result in an exemption so inequitable and unjust as applied to cases like the one we have before us that we think no one would contend that Congress intended the act to be so applied. Plaintiff's counsel call attention to the fact that the act was subsequently amended; that the committee report accompanying the amendment stated that it was thought that the

act of 1921 was capable of the construction for which the plaintiff now contends, and should be amended as Congress obviously did not intend such a result. There are also some respectable authorities cited by plaintiff whose opinions appear to approve the construction placed upon the act by plaintiff. But in the consideration heretofore given this statute it seems not to have been noticed that subdivisions (c) and (3) (A) can not be separated from the preceding subdivision (a) which provides that the basis for ascertaining the gain derived from a sale or other disposition of property shall be the cost of such property except as stated in (c) that on an *exchange* of property no gain or loss shall be recognized when (3) (A) a person transfers property to a corporation and immediately after the transfer is in control of the corporation. In other words, the only exception to the rule laid down in (a) is made when there is an *exchange* of property. The transaction under consideration was not an exchange of property; it was a sale as we have expressly found. It seems plain that if the language of the act be followed plaintiff's contention can not be sustained. The fact that the act was subsequently amended to make the construction so clear that there could be no dispute about it does not operate to sustain plaintiff's contention. As the conclusion we have reached appears not to be in harmony with the opinions of some other courts, we prefer not to rest the judgment in the case upon it but will consider defendant's plea that the plaintiff's cause of action is barred by the statute of limitations.

The defendant alleges that the plaintiff's suit was not brought within the statutory time allowed after his claim for refund had been rejected. The original petition was filed October 29, 1931, and the original claim for refund was filed November 2, 1923. The claim was based, as before stated, on the allegation that the transfer of the lots to the hotel company was not taxable. After the claim was filed, the Bureau of Internal Revenue had an agent make a special audit of plaintiff's books which disclosed a deficiency of $3,196.07 and showed that in the computation of the tax the transaction which involved the sale of the lots was treated as a cash sale and a tax assessed on the profit derived. On September 10,

1924, the plaintiff was advised of the audit, also that the amount last mentioned had been assessed as a deficiency and that his claim had been rejected. From then on until October 30, 1929, the plaintiff continued to protest against the action of the Commissioner in holding that he derived taxable gain from the sale of the three lots to the Tuller Hotel Company and insisted that the transaction was not in fact a sale and that the tax was wrongfully assessed against him. The Bureau held that these repeated protests were not well founded and rejected the claim for refund because the "transfer was made for cash." The plaintiff appears to have been first advised by letter dated September 10, 1924, that his claim for refund had been rejected; on March 17, 1926, he was advised that this rejection was sustained; on November 26, 1926, he was again told that the rejection was sustained; on June 29, 1927, the Commissioner advised him that no further action would be taken; and, upon the matter being again taken up by a representative of the plaintiff, he was advised by the Commissioner on August 12, 1927, that every consideration had been given to the information submitted, that the tax liability before determined was correct, and that his request for reconsideration was denied. Whereupon, on January 30, 1929, the plaintiff's representative filed an application for reopening of plaintiff's claim setting out his contentions, and when the Commissioner advised him that his letters would be given consideration at the earliest practicable date, plaintiff then filed a supplemental claim increasing the amount of refund claimed.

On October 30, 1929, the Commissioner of Internal Revenue wrote the plaintiff a letter going into detail, which seems to us entirely unnecessary after what had occurred, and explaining at length why plaintiff's claim had been rejected.

It is quite evident from what we have stated above that the plaintiff was not in any way misled and has received every consideration on the part of the Government officials. He now claims that because in the last communication from the Department they took pains to explain to him at great length the reason why his claim had been rejected and his application for reconsideration denied, this action amounted

to a reconsideration. The question of whether a claim has been reconsidered is one of fact to be determined from all of the circumstances of the case. Plaintiff contends that some new reasons were given to show that the action theretofore taken by the Commissioner was incorrect, but no new facts had been presented and if in an endeavor to explain the situation fully the Commissioner gave some additional reasons justifying his former rejection of the claim, his action in so doing was not a reconsideration of the claim. He was merely setting out the matters upon which he based his concluding statement—"In view of the foregoing the requests for the reopening of the claim are denied." We have found as an ultimate fact from all of the evidence that plaintiff's claim was not reconsidered in 1929. Plaintiff filed his petition October 29, 1931, just two years after he claims the reconsideration took place. As plaintiff's claim for refund had been rejected several times in 1927 and in prior years, it is evident that it is barred by the statute of limitations.

It follows that plaintiff's cause of action should be dismissed, and it is so ordered.

WHALEY, *Judge*; WILLIAMS, *Judge*; LITTLETON, *Judge*; and BOOTH, *Chief Justice*, concur.

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## MARIANNE KRAUSZ AND PAUL HOHENAU, AS SOLE LEGATEES, HEIRS AT LAW AND NEXT OF KIN OF SALO COHN, DECEASED, v. THE UNITED STATES

[No. 42802. Decided April 6, 1936. Motion for new trial overruled, with opinion, June 29, 1936.]

*On the Proofs*

*Estate tax; property in hands of Alien Property Custodian; application of general tax laws.*—The general statutes with reference to the collection of taxes were not applicable to funds in the hands of the Alien Property Custodian except as specifically provided in the statutes pertaining to the powers and duties of the Custodian and the disposition of such funds.

Reporter's Statement of the Case

*Rights of alien owners in property seized by Alien Property Custodian; rights against Government for such seizure.*—Until the law made provision for the return of property of aliens seized during the World War and held by the Alien Property Custodian, such aliens had no enforceable rights or interest in the property or against the Government by reason of the property's being so held.

*Taxes due without assessment; computation and withholding of taxes on seized alien property; limitation of amount to be withheld for taxes.*—Taxes become due without being assessed, and the amendment to section 24 of the Trading with the Enemy Act required that where taxes were due from aliens whose property had been seized by the Alien Property Custodian, they should be computed and withheld without regard to the statute of limitations, and no limitation was placed by the amendment upon the amount the Government would withhold for taxes on property held by the Custodian.

*Government's return of property seized by Alien Property Custodian; right of Government to impose conditions.*—In returning the property seized by the Alien Property Custodian, the Government had the right to impose such terms and conditions as it pleased Congress to enact, and there is no reasonable doubt that the intention of Congress was to return only the corpus of the property remaining after the payment therefrom of taxes and other expenses.

*Statutory construction.*—Where the intent of a statute is manifest and the language ambiguous, the intent must control.

*The Reporter's* statement of the case:

*Mr. Richard H. Wilmer* for the plaintiffs. *Mr. Douglas L. Hatch* was on the briefs.

*Mrs. Elizabeth B. Davis*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of facts as follows:

1. Salo Cohn, a citizen of Austria and resident of Vienna, Austria, died testate at Vienna, Austria, on April 25, 1917. At the time of his death he was in possession of securities which were physically situated in the United States, the value of which was $974,506.21. After the death of Salo Cohn, all the said securities were seized and administered by the Alien Property Custodian under the Trading with the Enemy Act, as amended.

2. On November 24, 1928, the Commissioner of Internal Revenue notified the Alien Property Custodian of Federal

estate taxes due on the estate of Salo Cohn in the amount of $57,172.97 and demanded payment thereof. This amount was paid by the Alien Property Custodian on January 31, 1929. An assessment was entered by the Commissioner of Internal Revenue covering this payment on the January 1929 Miscellaneous Tax List at page 302, line 8 thereof. On October 11, 1929, the Commissioner of Internal Revenue notified the Alien Property Custodian of an additional Federal estate tax due on the estate of Salo Cohn in the amount of $2,415.00 and demanded payment thereof. This amount was paid by the Alien Property Custodian on November 18, 1929. Assessment was entered by the Commissioner of Internal Revenue covering this payment on the December 1929 Miscellaneous Tax List. The Alien Property Custodian paid to the Collector of Internal Revenue at Baltimore, Maryland, the total amount of $59,587.97 as estate taxes on the estate of Salo Cohn from the seized property of the estate of Salo Cohn.

3. On February 4, 1929, a Federal estate tax return on Form 706, executed by Dr. Max Hitschmann of Vienna, as executor of the estate of Salo Cohn, was filed by him with the Alien Property Custodian at the latter's request. On February 6, 1929, this return was filed by the Alien Property Custodian with the Collector of Internal Revenue at Baltimore, Maryland. This is the only estate tax return filed for the estate of Salo Cohn.

4. A claim for refund of the total estate taxes paid by the Alien Property Custodian in the amount of $59,587.97 was filed on behalf of the estate of Salo Cohn by the Alien Property Custodian with the Collector of Internal Revenue at Baltimore, Maryland, on August 6, 1932. This claim for refund was rejected by the Commissioner of Internal Revenue under date of September 8, 1932. Application to reopen the claim for refund was denied by the Commissioner of Internal Revenue by letter dated January 30, 1934.

5. The plaintiffs, Marianne Krausz and Paul Hohenau, are now and have always been citizens of Austria and now reside in Austria. They are the only children of Salo Cohn, deceased, and are the sole owners of and have not assigned the claim herein referred to. If the estate tax paid as

aforesaid shall be deemed by this Court to constitute an overpayment, Marianne Krausz and Paul Hohenau are the proper parties plaintiff to recover jointly the amount of the overpayment.

The court decided that plaintiffs were not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Salo Cohn, a citizen of Austria, died on April 25, 1917. At the time of his death he was in possession of securities kept in the United States the value of which was $974,506.21. After his death these securities were seized and administered by the Alien Property Custodian under the Trading with the Enemy Act, as amended.

In the years 1928 and 1929, the Commissioner of Internal Revenue notified the Alien Property Custodian of Federal estate taxes due on the estate of Salo Cohn in the total amount of $59,587.97, and in 1929 entered two assessments covering these taxes. The Alien Property Custodian in 1929, paid the total amount of these taxes in accordance with the notices received from the Commissioner. No return was ever filed for the Federal taxes on the estate of Salo Cohn except one filed on February 4, 1929, executed by one of the executors of the estate at the request of the Alien Property Custodian and filed in the office of the Custodian. On August 6, 1932, the Alien Property Custodian filed a claim for refund of the estate taxes paid by him on behalf of the estate in the amount of $59,587.97. The claim for refund having been rejected by the Commissioner, this suit is now brought to recover the amount thereof.

Plaintiffs' suit is based upon the claim that all of the provisions of the revenue laws with reference to assessment and collection of Federal taxes together with all of the provisions with reference to refunds of taxes illegally or erroneously collected are applicable to their cause of action. We think this theory can not be sustained when the peculiar facts of the situation are considered in connection with the special statutes applicable.

In order to clearly set forth the extraordinary conditions which prevailed during the period involved in the case and

the special statutes which were enacted to meet these conditions, it is necessary to make a brief historical review.

At the time the United States became a participant in the World War, German Nationals owned property situated or kept within the United States to the value of about $245,000,000. This property was of almost every description including money, securities, patents, ships, radio stations, etc. Besides this, there was a very large amount of property belonging to Austrians and Hungarians. Congress passed what is known as the Trading with the Enemy Act which, among other things, authorized the seizure of this property and placed it in charge of an officer called the Alien Property Custodian. After the war ended the question arose as to what disposition should be made of the properties so held. There had been an old treaty with Prussia long before it became a part of the German Empire which provided that in case of war between the two countries the private property of the warring nationals should not be confiscated. Although this treaty no longer controlled, the rule expressed in it came to be regarded in the United States at least as a sound principle of international law and consequently the German owners of this property were knocking persistently at the doors of Congress asking that their property be returned to them. It was felt that there was much equity in their claim and the Trading with the Enemy Act was amended to provide for the payment of certain small claims. On the other hand about $186,000,000 had been found due from Germany to American claimants and established by awards determined by the mixed claims commission which had been created under the treaty of peace with Germany. Germany was a bankrupt nation unable to pay these awards and loud protests came from the American claimants against paying the German claimants without any provision for the payment of just American claims. The problem before Congress was an extremely difficult one and although many efforts were made to dispose of it there were so many different kinds of claims and so many conflicting interests that year after year went by without the legislators being able to agree upon a bill. One of the many serious problems in the case arose from the fact that

Germany was unable to make any payment and there were not sufficient funds in the hands of the Alien Property Custodian, even when there was added thereto a large sum which it was expected would be paid for the German ships and radio stations, to pay both the German claimants and the American claimants at once. Finally the matter was referred to the Ways and Means Committee, which prepared a bill, and a statute was enacted more than twenty-three pages in length which contained provisions for the disposition of the property which was held by the Alien Property Custodian and created a fund out of which the American claimants could be paid. This statute was called the War Claims Settlement Act and was approved March 10, 1928, 45 Stat. 254.

A consideration of the facts above stated makes it plain that until the law made provision for return of the property none of the alien parties whose property had been seized had any enforceable rights or interest either in the property or against the Government by reason of its being so held and whenever this matter has been presented to the courts they have so decided. Whatever rights the former owners subsequently obtained were through and under the War Claims statute which was purely an act of grace on the part of our Government. The United States could have retained the property seized, and disposed of it as it saw fit, applied it on taxes, or appropriated it entirely and had it covered into the miscellaneous receipts of the Treasury, regardless of the statutes limiting the collection of taxes. Whatever it did with the money, the former owners would have had no cause of action against the Government until some statute was enacted making special provision for the return of the property or a portion of it and then only upon the conditions expressed in such statute.

It is argued on behalf of the plaintiffs that the War Claims Act did not repeal the provisions of the statutes with reference to the assessment and collection of taxes and that as these statutes were not repealed, they were not only in force at the time when the Alien Property Custodian turned the money involved over to the Commissioner but applied directly to the funds in the hands of the Alien

Property Custodian, and consequently the disposition of these funds was controlled by the general statutory provisions with reference to taxes. This is clearly an erroneous conclusion. We have already shown that until the War Claims Act became a law the former owners of the property seized had no enforceable rights whatever therein and when this act was passed they acquired no rights except those granted thereby. The War Claims Act made provision for the payment of taxes and the Government having complete right to retain the property, none of the taxing statutes had any application except as specially stated in the act itself.

At this point it should be noted that the plaintiffs did not file the only claim for refund made in this case. It was filed by the Alien Property Custodian. Why, we do not know. It would seem self-evident that the Alien Property Custodian was not the agent for the former owner of the property. He was the agent of the Government itself and did not act for the plaintiffs in filing the claim for refund. See Opinion of Attorney General, Vol. 32, pp. 249, 253. The incongruous situation is presented where an agent of the Government files a claim against the Government. If anyone was authorized to file a claim for refund, it would seem to be the plaintiffs; yet the plaintiffs had not paid the tax, it was paid by the Alien Property Custodian out of money over which the Government had complete control and the right to appropriate as it saw fit. These features of the case show how difficult if not impossible it is to apply the general provisions of the taxing statutes to the case now before us. The attempt to do so leads into all sorts of inconsistencies and presents one of the many reasons why we think Congress had no intention of restricting the right of the Government to retain money or property which had been seized by the Alien Property Custodian by applying the general statutes with reference to the assessment and collection of taxes.

What has been said above, we think shows plainly that plaintiffs' case depends not upon whether the provisions of the revenue laws with reference to the assessment and collection of taxes were repealed by the War Claims Settle-

ment Act but upon whether that statute made these provisions applicable in determining the amount which the claimants should receive. The taxes involved were not assessed and collected within the period prescribed by the general provisions of the revenue laws and if they are applicable in determining whether the money involved in the suit can be retained by the Government it is obvious that plaintiffs are entitled to recover. On the other hand, if the War Claims Settlement Act, as we think, provided that the taxes should be computed, as if the property had not been seized by the Alien Property Custodian, and then paid without any further restrictions, the plaintiffs have no foundation for their suit.

Plaintiffs rely largely on section 24 of the Trading with the Enemy Act which was amended by the War Claims Settlement Act in section 18 thereof which was headed "Taxes." Section 24 of the Trading with the Enemy Act was made subdivision (a) by the amendment and subdivisions (b) to (f) inclusive were added. Section 24 (now subdivision (a)), among other things, provided:

> The Alien Property Custodian is authorized to pay all taxes * * * heretofore or hereafter lawfully assessed * * * against any money or other property held by him * * *.

It did not direct the Alien Property Custodian to pay or turn over anything to the former owners of the property but merely authorized the payment of certain taxes. Subdivision (b) of the amendment reads as follows:

> (b) In the case of income, war-profits, excess-profits, or estate taxes imposed by any Act of Congress, the amount thereof shall, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, be computed in the same manner (except as hereinafter in this section provided) as though the money or other property had not been seized by or paid to the Alien Property Custodian, and shall be paid, as far as practicable, in accordance with subsection (a) of this section. Pending final determination of the tax liability the Alien Property Custodian is authorized to return, in accordance with the provisions of this Act, money or other property in any trust in such amounts as may be determined, under regulations prescribed by the Commis-

sioner of Internal Revenue with the approval of the Secretary of the Treasury, to be consistent with the prompt payment of the full amount of the internal-revenue taxes.

It is assumed by plaintiffs that by amending section 24 of the Trading with the Enemy Act in this manner a limitation was placed upon the amount which the Government would withhold for taxes and that the money or property which had been seized would be returned in its entirety without any deduction on account of taxes not lawfully assessed. We do not think this construction accords with the language of the amendment and are clear that it is not in harmony with the intention of Congress. The amendment (b) quoted above does not pertain to the assessment of taxes in any way. On the contrary it so carefully avoids the use of the word "assessment" that we think it evident Congress took into consideration the fact that there would be taxes due and unpaid but never assessed. Instead of saying that taxes shall not be paid unless lawfully *assessed*, it states they shall "be *computed* in the same manner (except as hereinafter in this section provided) as though the money or other property had not been seized by or paid to the Alien Property Custodian, and shall be paid, as far as practicable, in accordance with subsection (a) of this section." [Italics supplied.] It is expressly provided that the taxes shall be paid, and the words "as far as practicable" did not make the payment depend upon the time when an assessment had been made for this was not a matter of practicability. These words evidently apply to the further provision contained in subdivision (a) that "such taxes * * * shall be paid out of the money or other property against which such taxes are assessed * * *, or (if such money or other property is insufficient) out of any other money or property held for the same person." Subdivision (b) recognizes that at the time of its enactment the taxes may not have been computed or assessed and made the further provision that "pending final determination of the tax liability the Alien Property Custodian is authorized to return, in accordance with the provisions of this Act, money or other property in any trust in such amounts as may be

determined, * * * to be consistent with the prompt payment of the full amount of the internal-revenue taxes." This provision evidently contemplates the payment of the "full amount" of the taxes without any restriction or limitation and the return of the property to the claimant less taxes and other charges the deduction of which was authorized.

In addition to what is stated above, it would seem that there is no reason at all for the enactment of subdivision (b) if only taxes lawfully assessed—that is, assessed in accordance with the general provisions of the taxing acts—were to be paid. An assessment must always be preceded by a computation of the tax, and where the tax had already been assessed in accordance with law no further computation was necessary. As to the taxes that had not been so assessed, there would be no use in making the computation if the construction for which plaintiffs contend is correct and the subsection could just as well have been entirely omitted. In this connection it should be kept in mind that taxes become due without being assessed.

We think the wording of subdivision (b) requires that where taxes were due from the aliens whose property had been seized they should be computed and withheld without regard to the statute of limitations. If it should be conceded for the sake of the argument that the statute was ambiguous, the surrounding circumstances clearly show that such must have been the intent of Congress. This money or property was turned over purely as an act of grace. In so doing, the United States was not standing upon its wartime rights but placed the matter on a moral and equitable plane highly favorable to the claimants. Having done this, it seems hardly conceivable that it was intended to turn this property back to the former owners without collecting taxes justly due from them. Our Government was intending to do exact justice to the alien claimants and it would exact no more than justice in requiring these taxes to be paid. Where the intent is manifest and the language ambiguous the intent must control.

We find no decisions that have been made on precisely similar cases. In the case of *Chemische Fabrik Von Heyden Aktiengesellschaft* v. *Tait*, 58 Fed. (2d) 815, the district court of Maryland held that—

> the "Settlement of War Claims Act" was an act of grace of the sovereign United States, and in returning the property this Government undoubtedly had the clear right to impose such terms and conditions as it pleased Congress to enact. The property could have been withheld entirely or confiscated beyond any legal right or remedy of the plaintiff.

The court went on to hold that subdivision (b) and other subdivisions of section 24 of the Trading with the Enemy Act as amended specified the terms and conditions on which the property should be returned to its former owner and it was said that—

> Sec. 24 (b–f) shows beyond any reasonable doubt that the intention of Congress was to return only the corpus of the property remaining after the payment of taxes and other expenses thereout; * * *. Obviously the intention was to make the property subject retroactively to taxes for the designated years. If, therefore, the tax had not previously been paid by the Alien Property Custodian, it was the intention of this legislation to require the determination and payment of the tax before the return of the property to the former alien enemy.

The case last cited differed from the case at bar in that it appeared that the deputy collector had made a return of the taxes which were assessed within the statutory period, but we do not think this makes any difference with the principle announced by the district court, which also observed that it seemed "highly doubtful if the plaintiff in its own name has any standing whatever in court to recover a tax paid by the Custodian to the Collector of Internal Revenue." But the court did not find it necessary to rule on this question, or upon whether the plaintiff in that case could avail itself of the claim of refund filed by the Custodian. We think it could not, for, as above stated, the

Custodian was not the agent of plaintiffs. On the other hand, we do not think there was any necessity for the filing of a claim for refund in the case now under consideration. If plaintiffs are entitled to have the money for which they sue paid over to them, it is because the War Claims Settlement Act (contrary to our construction) provided that this should be done and they needed no claim for refund.

Counsel for plaintiffs call attention to a ruling of the general counsel of the Bureau of Internal Revenue in which it was held that the Settlement of War Claims Act did not abrogate the general statute of limitations applicable to the assessment and collection of an internal-revenue tax, but if we are correct in what has been stated above, an erroneous basis was taken for the ruling. We have already shown that the omission from the War Claims Settlement Act of any provision repealing the general provisions relating to the assessment and collection of taxes did not make them applicable to the money in the hands of the Custodian. It required a special provision in the War Claims Settlement Act to make them applicable. This ruling, however, is not very material, as the Bureau did not adhere to it, and it seems to have been withdrawn.

Under our view of the law applicable to the case the plaintiffs' petition must be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

OPINION ON MOTION FOR NEW TRIAL

*Per curiam:*

The motion for new trial is based largely upon the contention that the court erred in the views expressed in the opinion with reference to the authority of the Alien Property Custodian to file a claim for refund, but it is not necessary to discuss this question as the decision of the court did not depend upon the ruling on this point. What was stated with reference to this matter in the former opinion was merely for the purpose of showing the incongruity which occurred when the Alien Property Custodian, an officer of

the United States, in his official capacity filed a claim against the United States. This was mentioned as showing the difficulty in undertaking to apply all of the general statutes with reference to the collection of taxes to a case of the nature now before us, but what was said with reference to this matter was not controlling on the final decision. The judgment of the court was based upon matters entirely independent of whether a proper claim for refund was filed, the court having ruled that the general statutes with reference to the collection of taxes had no application to funds in the hands of the Alien Property Custodian except as specially provided in the acts pertaining to his powers and duties and the disposition of such funds.

The former opinion approved the rule laid down in the case of *Chemische Fabrik Von Heyden Aktiengesellschaft* v. *Tait*, 58 Fed. (2d) 814, that "in returning the property this Government undoubtedly had the clear right to impose such terms and conditions as it pleased Congress to enact." Also, that there was *no "reasonable doubt* that the intention of Congress was to return only the corpus of the property remaining after the payment of taxes and other expenses thereout; * * *. Obviously the intention was to make the property *subject retroactively* to taxes for the designated years." [Italics ours.] We adhere to our conclusion that this rule applies without regard to the general laws with reference to the collection of taxes.

Counsel for plaintiffs in construing the provisions of the War Claims Settlement Act (H. R. 7201) place great stress on certain parts of the reports of the House and Senate and of the conference committee which accompanied the bill and they quote the parts thereof which they consider support their contention. Had the provisions quoted and relied upon by plaintiffs' counsel been incorporated in the act, we think they would in any event have been merely separate and independent provisions. But, as sometimes happens, when the bill was finally adopted these provisions, including the part that related to assessments and claims, were omitted entirely. The only provisions contained in the War Claims Settlement Act which relate to taxes are found under sec-

Syllabus

tion 18, which amended section 24 of the Trading with the Enemy Act and is referred to at some length in the original opinion; and the only reference in regard to filing claims is found in section (f) which provides when a "claim" may be filed under the preceding subdivisions of this section. The provision is obviously entirely independent of the general statutes with reference to collection of taxes.

The motion for new trial must be overruled, and it is so ordered.

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## PIONEER COAL & COKE CO. v. THE UNITED STATES

[No. K-483. Decided May 4, 1936]

*On the Proofs*

*Income and profits tax; overpayment; filing of refund claim.*—Overpayments of income and profits taxes for the years 1917 and 1918 credited on taxes due for a subsequent year cannot be recovered as overpayments for 1917 and 1918 where no refund claims were filed by the taxpayer for such overpayments.

*Overpayments credited on taxes for subsequent year not recoverable as overpayments for such subsequent year.*—Overpayments of income and profits taxes for the years 1917 and 1918 credited by the Commissioner of Internal Revenue on taxes due for the year 1920 and claimed in the petition as overpayments for 1917 and 1918, held not recoverable as overpayments for 1920.

*Account stated.*—There is no basis for a suit by the taxpayer as upon an account stated where the account does not show a balance in favor of the taxpayer.

*Payment or collection of tax; validity where no direct or separate assessment.*—A direct and separate assessment against a taxpayer is not necessary to a valid payment or collection of a tax due.

*Assessment against parent corporation making consolidated return; allocation of assessment to affiliates in the return.*—Where the taxes due on a consolidated income-tax return were assessed by the Commissioner of Internal Revenue against the parent corporation making the return, a reassessment was not necessary for an allocation of the assessment by the Commissioner among the affiliates in the consolidated return.

Reporter's Statement of the Case

*Assessment of tax to corporation making consolidated return; elimination of one of affiliates; allocation of assessment to affiliates; validity of assessment and collection.*—The assessment against the plaintiff corporation of the entire tax due on a consolidated income-tax return made by it for itself and affiliates, and the payment thereof, held valid notwithstanding the elimination of one of the affiliates by the Commissioner of Internal Revenue, where the assessment was properly allocated among the affiliates by the Commissioner in accordance with their respective taxable net incomes.

*The Reporter's* statement of the case:

*Mr. Thomas Watson* for the plaintiff.

*Mr. J. W. Hussey*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

Plaintiff seeks to recover $94,013.91 with interest, alleged overpayment of income and profits tax for 1920, in respect of the total tax assessed and paid on a consolidated return filed for that year in which the incomes of plaintiff, National Transportation Company, Tidewater Coal Company and Consolidated Coke Company were included.

The claim that the tax shown on this consolidated return was overpaid arises as a result of the elimination of the Consolidated Coke Company from the affiliated group and the contention of plaintiff, on behalf of itself, the National Transportation Company, and the Tidewater Coal Company, that the total tax which they paid was $514,770.17 and that the correct tax on the consolidated net income of plaintiff, National and Tidewater companies, which were held to be affiliated for the taxable year, was $420,756.26. Plaintiff also seeks to recover $7,029.66 for 1917 and $9,755.27 for 1918 with interest, overpayments applied as credits against the tax shown by and assessed upon the consolidated return for 1920.

The defendant contends that there was no overpayment by plaintiff or by any of the other corporations which joined in the consolidated return for 1920 and that the overpayments for 1917 and 1918, credited in partial satisfaction of the assessment made on the consolidated return for 1920, cannot be recovered for the reason that no claim for refund

was filed and that the certificates of overassessments showing the credits stated the account exactly as it was settled.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

**1.** March 15, 1921, plaintiff, a Pennsylvania corporation, executed and filed a consolidated income and profits tax return for 1920 in which was included the income and invested capital of the National Transportation Company, the Tidewater Coal Company, and the Consolidated Coke Company, hereinafter sometimes referred to as the National, Tidewater, and Coke companies. The plaintiff herein was exclusively a selling agency. It owned no property, coal or coke mines. The National Transportation Company owned and operated steamboats and barges for transporting coal and coke on rivers; it owned no mines. The Tidewater Coal Company was engaged entirely in the business of selling coal produced by other operating companies; it owned no coal-mining properties. The plaintiff and the Tidewater Company were the exclusive selling agencies for the Consolidated Coke Company and others. The Consolidated Coke Company owned large coal and coke properties and was strictly an operator. All of the stock of the Pioneer, the National, and the Tidewater companies was held by four individuals who were the officers and directors of all four of the corporations. These individuals also owned a considerable portion of the stock of the Consolidated Coke Company, but the Coke Company had a number of other stockholders who were not stockholders in any of the other corporations. In the consolidated return for 1920 plaintiff was shown as the parent corporation. At the time this return was filed the National, Tidewater, and Coke companies filed information returns showing that their income and invested capital had been included in the consolidated return in which plaintiff was shown as the parent corporation, and under Item 7 of the information returns the inquiry "If apportionment is made, state the amount of income and profits taxes for the taxable period to be assessed against the subsidiary or affiliated corporation making this return" was left unanswered. At the time this consolidated return was prepared it was agreed among the four corporations, as

hereinafter disclosed in more detail, that each corporation would be responsible for and would pay its portion, as nearly as could be estimated, of the total tax shown by the consolidated return to be due on the basis of the net income of each corporation and that such tax would be paid through the plaintiff as the parent corporation.

2. The consolidated return as filed showed a total tax liability for the four corporations of $686,222.58. This return was made in the name of plaintiff as the parent corporation. Upon receipt of the return by the Commissioner of Internal Revenue through the collector's office, the tax shown to be due on the return was, in accordance with the usual practice of the Commissioner, assessed in the name of the Pioneer Coal & Coke Company, plaintiff herein. The net income of each of the four corporations and the total thereof, as the consolidated net income, were set forth in the return as follows:

| | |
|---|---|
| Plaintiff | $483, 975. 45 |
| National Company | 76, 852. 97 |
| Tidewater Company | 517, 606. 22 |
| Consolidated Company | 519, 018. 65 |
| Consolidated income | 1, 597, 453. 29 |

During 1920 and at the time of the filing of this return, the four corporations had identical officers and boards of directors. Before the consolidated return was prepared and filed, the officers and directors of the four corporations had a number of conferences during February and March 1921 with reference to the making of returns for the four corporations for 1920 and for the purpose of arriving at an understanding or agreement as to the manner in which the tax liabilities of the several corporations should be paid. These conferences consisted of informal gatherings at which no minutes were kept and no resolutions were adopted. As a result of these conferences the officers concluded the four corporations were affiliated for 1920 and that a consolidated income and profits tax return should be filed. It was also agreed that each of the four corporations included in the consolidated return should be responsible for and pay its proportion of the total tax shown thereon. The amount to be paid by each corporation was arrived at on the basis

which the ratio of tax that each corporation would have been required to pay, had it filed a separate return, bore to the total tax computed on the consolidated net income shown in the consolidated return, as nearly as could be determined. It was further agreed that such payment should be made through the plaintiff, as agent, in settling the consolidated tax liability for 1920 except that, as the Consolidated Coke Company had a claim for refund for $170,000 pending for 1918, that Company would execute and file with the collector a claim for credit of the alleged overpayment of $170,000 against the first installment of $171,555.66 of the consolidated tax of $686,222.58 shown on the consolidated return; that in addition to the claim for credit the Consolidated Coke Company would give plaintiff, as the parent corporation and paying agent, its check for $1,452.41. The amount of the claim for credit and this check equaled the amount of $171,452.41 which had been estimated to be the liability of the Coke Company for its portion of the tax of $686,222.58 shown on the consolidated return. It was agreed that plaintiff, National, and Tidewater companies would, upon the filing of the return and claim for credit, pay to the Consolidated Coke Company in cash the amount which each would be required to pay in cash upon the first installment of the total tax shown on the consolidated return if the Consolidated Company's claim for credit in the amount of $170,000 was not filed to apply against the first installment of one-fourth of the consolidated tax of $686,222.58. No cash payment except $1,555.66 was ever made on the first installment, and the claim for credit was subsequently rejected. The difference between the first installment of $171,-555.66 of the consolidated tax and the amount of the Consolidated Coke Company's claim for credit and check for $1,452.41, or $103.25, was paid by plaintiff. There was no agreement among the four corporations that plaintiff would assume the tax liability of any of the other corporations. The Commissioner of Internal Revenue was never advised of any agreement among the four corporations that he should look solely to plaintiff for the amount of tax due for 1920, nor was he advised, prior to the filing of the claim for refund in 1929, as to any arrangement between the corpora-

tions as to how the tax shown to be due on the consolidated return would be paid.

At the above-mentioned conferences between the officers and directors of the corporations it was further agreed that the total consolidated tax liability of $686,222.58 computed for 1920 would be paid by the four individual corporations in the amounts of $230,953.18 by plaintiff, $36,815.40 by the National Company, $247,001.59 by the Tidewater Company, and $171,452.41 by the Consolidated Coke Company.

When the consolidated return was filed the first installment of $171,555.66 was not paid to the collector in cash because of the filing of a claim for credit by the Consolidated Company asking that the amount of $170,000, alleged overpayment for 1918, be credited against that amount of the first installment shown on the consolidated return for 1920. The balance of the first installment of $1,555.66 was paid as hereinbefore mentioned. Upon the filing of the claim for credit the collector in accordance with the usual practice made no effort during the pendency of the claim for credit to collect the amount of $170,000 of the first installment of the 1920 tax. At the time the claim for credit was filed, the Commissioner had not acted upon the Consolidated Coke Company's claim for refund for 1918. The refund claim and claim for credit were subsequently denied, as will be hereinafter referred to in more detail in finding 9.

Following the filing of the claim for credit against the first installment of the consolidated taxes for 1920 and in accordance with the understanding between the corporations before the consolidated return was filed, the plaintiff, National, and Tidewater companies on May 2, 1921, paid to the Consolidated Coke Company $127,136.90 consisting of payments in the amounts of $56,182.65 by plaintiff, $9,203.85 by National, and $61,750.40 by the Tidewater companies, which were the amounts these three corporations would have had to pay to the collector as their proportion of the first installment of the total tax shown on the consolidated return had the Coke Company not filed its claim for credit.

**3.** The total cash paid by checks to the collector in respect of the total consolidated tax liability of $686,222.58 for 1920 amounted to $516,222.58 which the plaintiff on behalf

of itself and as the agent of the other three corporations transmitted to the collector in the amounts of $1,555.66, $171,555.65, $171,555.64, and $171,555.63 on March 15, June 14, September 14, and December 15, 1921, respectively.

With respect to the second, third, and fourth installments, plaintiff paid on its own account and each of the three other corporations contributed to plaintiff for delivery to the collector its proportionate share as follows:

| Name | 2nd | 3rd | 4th | Total |
|---|---|---|---|---|
| Plaintiff | $57,738.30 | $57,738.29 | $57,738.29 | $173,214.88 |
| National Company | 9,203.85 | 9,203.85 | 9,203.85 | 27,611.55 |
| Tidewater Company | 61,750.40 | 61,750.40 | 61,750.40 | 185,251.19 |
| Consolidated Company | 42,863.10 | 42,863.10 | 42,863.10 | 128,589.30 |

The checks issued to the Consolidated Coke Company May 2, 1921, as hereinbefore stated, by plaintiff, National, and Tidewater companies for the amounts which they would have been required to pay to the collector, except for the filing by the Coke Company of its claim for credit, each stated on its face the purpose for which given. The check of plaintiff for $56,182.64 stated that it was for the "First quarterly payment on account 1920 income tax, less amount paid by our check #2763, $1,555.66." The check of the National Company for $9,203.85 stated that it was for "First quarterly payment account 1920 income tax." The check of Tidewater Company for $61,750.40 stated that it was for "First quarterly payment account 1920 income tax." The checks subsequently delivered by the National and the Tidewater companies to plaintiff for their portions of the second, third, and fourth installments of the tax shown due on the consolidated return stated the purposes thereof in a similar manner. The three checks issued by the Consolidated Coke Company of $42,863.10, each payable to plaintiff, who was the agent for all of the corporations, for payment to the collector of the tax shown due on the consolidated return, stated on the face thereof, in each instance, that the amount of the check was for "payment in full for second [third and fourth] installment of 1920 income taxes as per report filed." The second installment of the tax shown on the consolidated return was satisfied by delivery to the collector by plain-

tiff of its check for $171,555.65, payable to the collector, which check stated on its face that it was in payment of the second installment of income tax for 1920. The third installment was satisfied on September 14, 1921, by delivery to the collector by plaintiff of its check for $171,555.64 which showed on its face that it was in payment of the third installment of the 1920 income tax. The fourth installment was paid by delivery to the collector on December 15, 1921, by plaintiff of its check for $113,692.53, payable to the collector, bearing the notation "Part payment of fourth installment 1920 income tax" and plaintiff's check dated December 16, 1921, for $15,000 payable to the collector and bearing the notation "Balance account 1920 income tax" and, also, the check of the Coke Company dated December 2, 1921, payable to Pioneer Coal & Coke Company, the plaintiff herein, for $42,863.10 bearing the notation on the face thereof that it was the "Fourth and final payment of 1920 Federal taxes as per reports filed." The check of the Coke Company was delivered by plaintiff to the collector after having been endorsed as follows—"Pay to the order of D. B. Heiner, Collector of Internal Revenue."

4. Subsequent to the payments having been made as above stated, the Commissioner in February 1925 prepared and sent to the collector at Pittsburgh a schedule of overassessments in favor of the Pioneer Coal & Coke Company, plaintiff herein, in the amounts of $7,029.66 for 1917 and $9,755.27 for 1918. Consolidated returns were not filed for 1917 and 1918. These overassessments were found to be overpayments by the collector and were credited, upon approval by the Commissioner, in partial satisfaction of the unpaid portion amounting to $170,000 of the total assessment of $686,-222.58 made in the name of plaintiff on the consolidated return for 1920. The unpaid portion of the assessment for 1920 to which these overpayments were credited represented that portion of the first installment of the tax assessed on the 1920 consolidated return in respect of which the Consolidated Coke Company's claim for credit had been filed. The collection of the unpaid portion of the 1920 tax, to which these overpayments were credited, was not barred at the time the credit was allowed and made on April 27, 1925.

May 4, 1925, the Commissioner notified the plaintiff of these two credits, by delivering to it certificates of overassessment showing the details and the manner in which the credits had been made.

5. Waivers of the statute of limitation for assessment and collection of any tax due for 1920 were filed. After an investigation of the books, records, and the stock ownership of the four corporations, the Commissioner decided on June 15, 1927, that the Consolidated Coke Company was not affiliated by stock ownership or otherwise with the plaintiff, National, and Tidewater companies for 1920 so as to permit the computation of the tax liabilities of the four corporations on the basis of a consolidated return. At the same time the Commissioner decided that the plaintiff, National, and Tidewater companies were affiliated for 1920 by stock ownership under the provisions of section 240 of the Revenue Act of 1918 and entitled to have their tax liabilities determined on the basis of a consolidated return. The four corporations involved accepted this decision as correct and no protest thereto was filed. September 12, 1927, the Commissioner mailed to plaintiff, the National and the Tidewater companies, a notice of his preliminary determination based on the elimination of the Coke Company from the affiliated group, in which he advised that "of the total tax assessed [$686,222.58] a sufficient amount [$491,739.94] has been allocated to you to meet the revised tax liability shown herein. The remainder of the tax paid [assessed] for 1920 has been allocated to the Consolidated Coke Company." No additional tax was proposed against any of the companies in this letter. What the Commissioner actually did, as disclosed by the computation set forth in this letter, was to accept without change the net taxable income for 1920 of the plaintiff, the National, and the Tidewater companies as reported in the consolidated return and as disclosed in the revenue agent's report in August, 1924, and reduce the consolidated invested capital as shown in the consolidated return by the amount of $1,064,492.11 because of the elimination of the Consolidated Company from the affiliated group, all of which resulted in the computation of a total income and excess profits tax liability

of $491,739.94 for the affiliated group consisting of plaintiff, National, and Tidewater companies. In the computations disclosed in this letter, the total tax liability of the new affiliated group of $491,739.94 was deducted from the total tax of $686,222.58 assessed on the consolidated return, and the balance of $194,482.64 of the assessment made on the return was allocated to the tax liability of the Consolidated Coke Company. As a result, no additional amount to be assessed was shown. In this computation and allocation the Commissioner gave no consideration to any payments that had been made in respect of the tax shown on the consolidated return because, first, he was not advised of the payments that had been made and, second, he was concerned only with the matter of assessment which had been made and with the correct tax liability of the several corporations. Thirty days were granted for protest, which, upon application by plaintiff, was extended to November 26, 1927. On that date plaintiff on behalf of the three corporations constituting the new affiliated group filed a written protest to the Commissioner's allocation of tax assessed, asking that the profits tax of the new affiliated group for 1920 be determined and computed under the relief provisions of sections 327 and 328 of the Revenue Act of 1918 and alleging that certain abnormalities existed with regard to the income and invested capital of the three corporations constituting the affiliated group which entitled them to have their profits tax determined in the manner requested. The Commissioner upon consideration allowed this application for computation of the profits tax liability of the new affiliated group under the relief provisions. On June 6, 1928, he mailed to plaintiff, National and Tidewater Companies a letter which set forth at length and in great detail in eleven separate schedules the results of his audit of the consolidated return and the correct tax liability of each of the three corporations constituting the new affiliated group, as well as the tax liability for 1920 of the Consolidated Coke Company. This was the Commissioner's final determination for 1920. In Schedule 8 of this letter the income as reported by the four corporations included in the consolidated return originally filed was accepted without change and the

total assessment of $686,222.58 made on that return was allocated in accordance with Section 240, Revenue Act of 1918, to the four corporations based on the ratio which the net income of each company of the group bore to the consolidated net income as shown in the return, as follows:

| Name | Income | Tax | Percentage |
|---|---|---|---|
| Plaintiff | $483, 975. 45 | $207, 902. 80 | 30. 29[illegible] |
| National Company | 76, 852. 97 | 33, 014. 17 | 4. 81[illegible] |
| Tidewater Company | 517, 606. 22 | 222, 349. 84 | 32. 4020 |
| Consolidated Company | 519, 018. 65 | 222, 955. 77 | 32. 4903 |
| | 1, 597, 453. 29 | 686, 222. 58 | 100. 0000 |

In the foregoing allocation by the Commissioner, the new affiliated group consisting of plaintiff, National, and Tidewater companies was charged with $463,266.81 of the total assessment of $686,222.58 which had been made on the original consolidated return. The correct tax liability of the new consolidated group of three corporations, after the computation of their profits tax liability under section 328, was determined by the Commissioner and shown in Schedule 9 of this letter to be $420,756.26, or $42,510.55 less than the portion of the total tax assessed on the consolidated return and allocated to the consolidated group consisting of plaintiff, National, and Tidewater companies. This amount of $42,510.55 of the original assessment so allocated was applied against the amount of $207,902.80 originally allocated to plaintiff individually, thereby reducing the portion of the original assessment allocated to plaintiff to $165,392.25. The portion of the original assessment on the consolidated return which had been allocated to the National and the Tidewater companies remained the same with the result that $420,756.26 of the total assessment made on the consolidated return was allocated to the total tax liability in that amount of the three corporations constituting the new affiliated group, as follows: Plaintiff, $165,392.25; National Company, $33,014.17; Tidewater Company, $222,-349.84. The difference of $42,510.55 between the amount of $463,266.81 allocated to these three corporations from the total assessment made on the return and their correct tax liability of $420,756.26 was scheduled by the Commissioner

for abatement and was applied by the collector in reduction of the outstanding and unpaid portion of the first installment of $170,000 disclosed and assessed on the consolidated return filed, which amount of $170,000 had previously, in 1925, been reduced to $153,215.07 by the two credits totaling $16,784.93 for 1917 and 1918 overpayments, as hereinbefore mentioned. The balance of $222,955.77 of the total assessment made on the consolidated return as filed was allocated to the tax liability of the Consolidated Coke Company, which had been separated from the affiliated group, for 1920. As a result of the computations and allocations of the original assessment, no additional tax was shown in this letter to be assessed against any of the corporations. However, the Commissioner later determined and assessed an additional tax against the Consolidated Coke Company, as hereinafter set forth.

**6.** January 5, 1929, plaintiff filed a claim for refund of $94,013.91. This amount represented the difference between the tax of $514,770.17 alleged to have been paid by plaintiff, National, and Tidewater companies, as taxpayers, in respect of their tax liability as shown on the consolidated return filed in 1921 and the correct tax liability of these three corporations for 1920 as finally determined by the Commissioner in the amount of $420,756.26.

April 6, 1929, a letter signed by the plaintiff, the National, the Tidewater, and Consolidated Coke companies was filed with the Commissioner in connection with the claim for refund in which they sought to have the Commissioner change the allocation of the original assessment made on the consolidated return, as set forth in his final notice of June 6, 1928, and to allocate to and allow as an overassessment in favor of plaintiff, National, and Tidewater companies an amount of $51,503.36 in addition to the overassessment of $42,510.55 previously allowed on special assessment. The basis on which it was claimed that this additional overassessment of $51,503.36 should be allowed and scheduled in favor of the plaintiff, the National, and the Tidewater companies was that all of the tax, amounting to $516,222.58, paid in cash on the consolidated return except $1,452.41 had been paid by plaintiff, the National, and the Tidewater com-

panies and that an overassessment and overpayment of the total of $42,510.55 previously allowed plaintiff and the additional overassessment of $51,503.36 claimed, or $94,013.91, should be allowed and refunded with interest. On November 14, 1929, the Commissioner rejected the claim for refund on the ground that the original assessment made against the four corporations included in the consolidated return and the correct tax liability, as finally determined by him, had been allocated in accordance with the net income properly assignable to each, in accordance with the provisions of section 240 of the Revenue Act of 1918, and that there was no merit in the claim advanced by the plaintiff, the National, and the Tidewater companies in support of the claimed refund that the tax liability had not been assessed in accordance with an agreement alleged to have existed among the various corporations comprising the group at the time of filing of the consolidated return for 1920, of which he, the Commissioner, had no notice.

7. The amount paid by plaintiff, as a taxpayer, to the collector at Pittsburgh in respect of the tax shown on the consolidated return filed for 1920 was $173,318.13; the amount paid by the National Transportation Company, as a taxpayer, in respect of its tax liability as shown on such consolidated return was $27,611.55; and the amount paid by the Tidewater Coal Company, as a taxpayer, in respect of its tax liability as disclosed on such return was $185,251.19; or a total payment of $386,180.87 by these three corporations, which were finally held to be affiliated for 1920. The total consolidated tax liability of these three corporations for 1920 was $420,756.26, or $34,575.39 in excess of the total amount paid by these three corporations. The amount paid by the Consolidated Coke Company, as a taxpayer, in respect of its tax liability as disclosed on the consolidated return filed for 1920 was $130,041.71. The amounts paid by the National, Tidewater, and Consolidated companies in respect of the tax liabilities shown and assessed upon the consolidated return were contributed to the Pioneer Coal & Coke Company, plaintiff herein, which, in turn, paid these amounts either by its own check or by endorsing the checks of the other companies to the collector. There is still an

outstanding and unpaid assessment in the name of plaintiff on the books of the collector at Pittsburgh.

**8.** March 2, 1928, the Commissioner made his final determination in respect of the correct tax liability of the Consolidated Coke Company for 1920 after it had been eliminated from the consolidated group, and fixed the same at $238,891.51. Of this amount $222,955.57 was shown as previously assessed by allocation to this taxpayer of a portion in that amount of the total assessment made on the consolidated return in which the Consolidated Coke Company had been originally included, leaving an additional tax to be assessed of $15,935.74. This additional amount, together with interest of $2,352.59, totaling $18,288.33, was duly assessed by the Commissioner in August 1928, no portion of which has been paid. The outstanding and unpaid tax due by the Consolidated Coke Company for 1920 is $108,849.80.

**9.** For 1918 the Consolidated Coke Company made a return showing a tax of $170,000, which was assessed and paid in two installments of $85,000 each in March and June, 1919. In March 1926 the Commissioner determined and assessed an additional tax of $112,918.12 for 1918 for which a claim in abatement was filed and subsequently denied. This assessment has not been paid. In 1929, the Commissioner determined an additional tax to be due in the amount of $13,704.46 in excess of the amount of $170,000 assessed on the return and the additional assessment of $112,918.12 made in March 1926, and notified the Consolidated Coke Company thereof, from which it took an appeal to the U. S. Board of Tax Appeals, as hereinafter stated. This deficiency of $13,-704.46, together with interest of $3,202.84, was assessed by the Commissioner in January 1930. No portion of the outstanding assessments totaling $129,825.42 has been paid. In its return for 1919 the Consolidated Coke Company claimed a net loss which it sought to have applied against its net income for 1918 and filed a claim for refund of $170,000 paid on the return for 1918. This was the $170,000 in respect of which a claim for credit to 1920 was filed in March 1921 when the consolidated return hereinbefore mentioned for 1920 was filed with the collector at Pittsburgh. February 23, 1929, the Commissioner rejected these claims for

abatement, refund, and credit of the Consolidated Coke Company for 1918, and determined a deficiency of $13,704.46 for 1918 in excess of the tax of $282,918.12 theretofore assessed for that year. The Consolidated Coke Company appealed from this determination to the United States Board of Tax Appeals and prayed the board to disallow the deficiency determined by the Commissioner, and to find that $282,918.12 assessed for 1918 was not due and also to find an overpayment of $170,000 for that year. The Board denied the taxpayer's contentions and approved the determination of the Commissioner, 25 B. T. A. 345, and entered its decision that the outstanding assessed and unpaid portion of the correct tax liability for 1918 was $126,622.58. This decision of the Board was affirmed on appeal (70 Fed. (2d) 446).

**10.** Sometime prior to 1928 the Consolidated Coke Company acquired and thereafter owned all the stock of the Pioneer Coal & Coke Company, plaintiff herein. Prior to November 1, 1928, the Consolidated Coke Company failed and the Bank of Pittsburgh National Association was appointed a receiver; while acting as such receiver the Bank of Pittsburgh went into the hands of a receiver prior to 1932. The Pioneer Coal and Coke Company ceased business prior to 1931 and its affairs were liquidated, but it continued in existence as a corporation.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

With reference to the amounts of $7,029.66 and $9,755.27, overpayments allowed by the Commissioner of Internal Revenue for 1917 and 1918 and credited April 27, 1925, to the unpaid portion of the tax shown and assessed on the consolidated return filed for 1920, the plaintiff, in paragraphs 2 and 19 of its petition filed in this court, seeks to recover these amounts as overpayments for 1917 and 1918, and in the original brief the court was asked to enter judgment for these amounts as overpayments for 1917 and 1918. In the reply brief plaintiff contends that these amounts,

totaling $16,784.93, are recoverable in this proceeding as an overpayment for 1920 under the printed language "or such greater amount as is legally refundable", contained in the claim for refund filed for 1920 for $94,013.91, or as overpayments for 1917 and 1918 on the theory of an account stated. We are unable to agree with either position. No cause of action is stated in the petition for the recovery of these amounts as a collection or overpayment for 1920, but, on the contrary, such amounts were set up in the petition and sought to be recovered as overpayments for 1917 and 1918. Moreover, such credits were not included or in any way mentioned in the claim for refund filed for 1920. The refund claim as filed related wholly to the Commissioner's determination and allocation with respect to the tax assessed on the original return and to the resulting claimed overpayment of $94,013.91, hereinafter discussed. The amounts cannot be recovered as overpayments for 1917 and 1918 for the reason that no refund claims for those years were filed and the certificates of overassessment delivered on May 4, 1925, showed the credits. There was no statement of account showing a balance in favor of plaintiff. *Leisenring et al., Executors*, v. *United States*, 78 C. Cls. 171; *First National Bank of Beaver Falls, Administrator*, v. *United States*, 79 C. Cls. 744; *Pratt & Whitney Co.* v. *United States*, 80 C. Cls. 676.

Plaintiff contends on behalf of itself, the National, and the Tidewater companies in support of its right to recover the claimed overpayment of $94,013.91 for 1920 (1) that the Commissioner was bound under the statute to assess the tax shown to be due on the consolidated return separately against the four corporations whose income and invested capital were included therein in the proportion of their respective net incomes to the total consolidated net income as shown by the affiliated return, and that the assessment of the entire amount of $686,222.58 shown to be due by the consolidated return against plaintiff alone was erroneous; (2) that under the agreement made between the four corporations, parties to the affiliated return, to the effect that each corporation was to pay its own tax upon the net income properly assignable to it, the tax liability

of the Consolidated Coke Company was to be assessed against and paid by it and that an assessment of the tax liability of that company, in the name of plaintiff, was illegal; and (3) that the Commissioner, when he found and decided that the Consolidated Company was not affiliated with the other corporations, should have corrected his original assessment of the entire tax liability of $686,222.58 upon the affiliated return against plaintiff by abating $42,-510.55 thereof, representing the reduction in the tax liability of plaintiff, National, and Tidewater companies resulting from the computation of the profits tax under section 328, Act of 1918, and by abating $222,955.77, representing that portion of the total assessment allocated to the Consolidated Coke Company, so that the corrected assessment against plaintiff for itself and the two affiliated corporations would have been only $420,756.26.

Upon the record in this case we fail to find anything in what the Commissioner did that would give the plaintiff, the National, or the Tidewater companies, parties to the affiliated group for 1920, the right to recover any amount unless they actually overpaid their tax. This they did not do with respect to the tax paid upon the consolidated return, as we shall hereinafter endeavor to show. In so far as the credits of the overpayments for 1917 and 1918 made against the portion of tax shown on the consolidated return for 1920 are concerned, no recovery can be had in respect thereto for the reasons hereinbefore mentioned.

When the consolidated return was filed each of the four corporations whose income and invested capital were included therein was to be responsible for payment through plaintiff, as agent, of its portion of the tax shown to be due on the consolidated return on the basis of the ratio which its tax, if computed on a separate return, bore to the total net consolidated income as disclosed in the return, as nearly as could be determined. This was done so far as the payments made to the Government were concerned. The evidence does not show that there was any definite agreement as to the manner in which the Commissioner should assess the tax or that any particular amount should be separately assessed by the Commissioner against any one or more of the

corporations included in the affiliated group. The Commissioner was not advised of any understanding or agreement among the four corporations joining in the affiliated return until April 6, 1929, when the plaintiff, National, and Tidewater companies constituting the new affiliated group endeavored to have the Commissioner change his determination and allocation of the tax shown and assessed upon the original consolidated return so as to show an overassessment of at least $94,013.91 for 1920 in favor of plaintiff. We think the Commissioner was correct in refusing to do this and we are also of the opinion that the Commissioner's allocation of the assessment of $686,222.58 made on the return to the correct tax liability of plaintiff, National, and Tidewater companies as the new affiliated group and to the Consolidated Coke Company, the income of which was included in the assessment mentioned, was in compliance with the statute and in substantial accordance with the understanding between the four corporations when the consolidated return was filed. This was on the basis of the ratio which the net income of each separate company bore to the total net income as shown in the original return. If the Consolidated Coke Company had not been eliminated from the affiliated group, the Commissioner in his final determination would have made the same sort of allocation. The fact that the total tax shown on the affiliated return was assessed in the name of plaintiff rather than against the four corporations in separate amounts was of no controlling importance when the Commissioner came to allocate the total assessment made on the return to the separate corporations on the basis of the net income and invested capital properly assignable to each in accordance with its final determination. The assessment of the tax shown to be due on the consolidated return against plaintiff who made the return, even if not strictly in accordance with the statute, was not illegal. Nor did the manner in which the assessment was made render the tax collected for 1920 illegal or refundable. For the purpose of allocation of the assessments to the several corporations, no new assessments were necessary and the question whether any of the corporations were entitled to a refund depends upon whether it had

overpaid its tax rather than upon the manner in which the original assessment was made. *Mather Paper Co.*, 3 B. T. A. 1; *Meyersdale Fuel Co.* v. *United States*, 70 C. Cls. 765; *Mahoning Investment Co.* v. *United States*, 78 C. Cls. 231. Compare *Lewis et al.* v. *Reynolds*, 284 U. S. 281. A direct and separate assessment against a taxpayer is not necessary to a valid payment or collection of a tax due. *Meyersdale Fuel Co.* v. *United States*, *supra*. *John Muir* v. *United States*, 78 C. Cls. 150.

Following the usual practice, the Commissioner prior to examination and audit of the consolidated return filed for 1920 assessed the tax shown to be due thereon in the name of the company making the return. Assessments of taxes shown to be due upon returns filed with the collectors are made by the Commissioner on assessment lists prepared by the collector and forwarded to the Commissioner with the returns listed therein. These assessments, whether made on lists prepared by the collector or the Commissioner, are made without investigation or examination of returns and of necessity the tax shown on the return is listed and assessed in the name of the person or corporation making the return, and this is true in the case of consolidated returns, unless there is filed with the return a definite statement setting forth the names of taxpayers to be assessed and the amount to be assessed against each. The procedure just mentioned was followed in this case. If it be assumed that the assessment in the name of the plaintiff of the total taxes shown on the consolidated return was erroneous, this error was corrected when the Commissioner allocated the assessment to the several corporations in the ratio which the net income of each separate company of the group bore to the total net income as shown by the original return. The division and allocation of the original assessment relieved plaintiff, National, and Tidewater companies from further payment in respect of the portion of the assessment allocated to the Coke Company.

This brings us to the question whether the tax for 1920 was overpaid in connection with the payments made in respect of the tax shown on the consolidated return. As hereinafter explained in more detail, the alleged overpayment

is based on the claim that the total tax paid to the Government by the plaintiff, the National, and the Tidewater companies in respect of the tax disclosed to be due by the consolidated return for 1920 before the Consolidated Company was eliminated from the affiliated group was $514,-770.17, and that the correct tax liability of these three corporations as finally determined by the Commissioner was $420,756.26. It is obvious that the only ground upon which this claimed overpayment of $94,013.91 can be supported is by proof that the tax paid to the Government, or contributed and used for that purpose, by the plaintiff, the National, and the Tidewater companies, as the taxpayers, was $514,770.17. In an attempt to establish this fact it is contended that the Consolidated Coke Company, which was included in the consolidated group when the return was made but afterwards eliminated by the Commissioner, paid, as a "taxpayer", only $1,452.41 which was the amount of cash delivered by the Coke Company to the plaintiff to be paid to the collector with an additional amount of $103.25 to be contributed by plaintiff to take care of the excess of the first installment of $171,555.66 of the tax shown to be due on the consolidated return over and above the Consolidated Coke Company's claim for credit of an alleged overpayment for 1918 of $170,000. In answer to this the defendant points to the fact that the Consolidated Coke Company on June 13, September 12, and December 2, 1921, issued and delivered to plaintiff its three checks, each in the amount of $42,863.10, the exact amount of the Coke Company's proportionate part of the second, third, and fourth installments of the total tax of $686,222.58 shown on the consolidated return. Each of these checks bore on its face the endorsement that it was in full payment of the Coke Company's portion of the tax installment for 1920 to which it related. These checks were payable to and were cashed by plaintiff and the amounts thereof, except the third check, were retained and used by plaintiff, so far as the record shows, to reimburse it for equal amounts transmitted by plaintiff to the collector as the agent of the other three corporations. The third check of the Coke Company for $42,863.10, dated December 2, 1921, was endorsed by plain-

tiff and delivered to the collector in partial payment of the fourth installment. In answer to this, plaintiff contends that the three amounts of $42,863.10 each, totaling $128,-589.30, were not contributions by the Consolidated Coke Company as a "taxpayer" toward the payment of any portion of the second, third, and fourth installments of tax shown on the consolidated return, but were returns of loans made to the Consolidated Coke Company on May 2, 1921, of $56,-182.64 by plaintiff, $9,203.85 by the National Company, and $61,750.40 by the Tidewater Company, totaling $127,136.89, which loans, it is contended, were made to the Coke Company by plaintiff, National, and Tidewater companies in the exact amounts of their proportionate liabilities on the first installment of tax shown on the consolidated return because the Consolidated Company had taken care of such liability by the filing of its claim for credit. These circumstances, however, will not support plaintiff's claim for an overpayment. The fact remains that the total amount of cash contributed and paid *to the Government* by the plaintiff, National, and Tidewater companies *as taxpayers* in connection with the tax shown to be due and assessed upon the consolidated return for 1920 was only $386,180.87 made up of direct payments or contributions of $173,318.13 by plaintiff, $27,611.55 by National, and $185,251.19 by Tidewater; the balance of the amount of $514,770.17, which was remitted to the collector by plaintiff as the paying agent, was directly paid by the Coke Company out of its funds by its three checks, each in the amount of $42,863.10, the exact amount of the Coke Company's proportionate part of the second, third, and fourth installments. The fact that plaintiff, National, and Tidewater companies in May 1921 loaned, as they claim, to the Consolidated Company amounts totaling $127,136.90 which they might have paid to the collector in March 1921, if the plaintiff had not filed a claim for credit against the first installment, does not make the amount of $128,589.30 subsequently contributed by the Coke Company by its checks drawn against its funds in June, September, and December, 1921, when the second, third, and fourth installments fell due, a payment to the Govern-

ment of a tax by plaintiff, National, and Tidewater companies.

The filing of the claim for credit against the first installment of tax reported for 1920 paid nothing. This claim was without merit and was subsequently rejected. What the situation would now be if the 1918 overpayment claimed had been allowed and credited, as requested, we need not decide. The fact here is that by filing this claim for credit the Coke Company paid nothing to the Government on its own behalf or on behalf of any other corporation. The amounts totaling $127,136.90 paid to the Coke Company on May 2, 1921, by plaintiff, National, and Tidewater companies (finding 2) at most only created the relationship of debtor and creditor between the Coke Company and such corporations. If the amounts totaling the sum mentioned were loans, as claimed, the Coke Company is still indebted to these companies for such amounts if repayment has not been made. If they were paid to the Coke Company by the plaintiff, National, and Tidewater companies on the belief that the claim for credit was valid for an overpayment of $170,000 for 1918 and therefore the equivalent of a cash payment, as strongly appears to have been the case from the manner in which the matter was handled, these companies simply purchased an interest in a claim, which, as matters turned out, was valueless. These facts and circumstances compel the conclusions, first, that upon the filing of the claim for credit, the only effect of which was to postpone collection of the first installment by the collector, none of the four corporations, parties to the consolidated return, paid anything on the first installment, except $1,452.41 by the Coke Company and $103.25 by plaintiff; second, that the liability of each of the corporations in connection with the second, third, and fourth tax installments shown and assessed upon the return was the amount set forth in the tabulation in finding 3, and these were the amounts paid by each corporation; third, that the Coke Company's proportionate liability on each of these three installments was $42,863.10 and that amount it contributed out of its funds by three checks payable to plaintiff; fourth, that plaintiff, National,

and Tidewater companies each paid from its own funds its proportionate part of the second, third, and fourth installments of tax determined to be due by each on the basis of its net income for 1920, just as the Coke Company did. It is clear, therefore, that the Coke Company paid no tax on the first installment for plaintiff, National, or Tidewater companies for which they reimbursed it, and the three amounts of $42,863.10, each paid by the Coke Company in connection with the second, third, and fourth installments, were not payments by plaintiff, National, and Tidewater companies on account of their tax liabilities for 1920.

No money belonging to plaintiff, National, or Tidewater companies is now in the hands of the Government in excess of what they properly owed as taxes for 1920. No overpayment has been made by plaintiff or by any other corporation which joined in the consolidated return for 1920. In fact the total amount of $386,180.87 directly paid on this return to the Government out of the funds of the plaintiff, National, and Tidewater companies, as taxpayers, for 1920, was $34,013.91 less than their combined tax liability of $420,-756.26. The petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

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## GEORGE O. CASTELL, ANCILLARY EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF BETA ISENBERG, DECEASED, v. THE UNITED STATES

[No. L-167. Decided May 4, 1936]

*On the Proofs*

*Income tax; interest on refund to Alien Property Custodian.*—The provision of section 18 (e) of the Settlement of War Claims Act of 1928 barring interest on refunds of internal revenue taxes imposed in respect of property seized or taken over by the Alien Property Custodian held not to apply to a refund of income tax paid by the Custodian in behalf of a loyal citizen of the United States.

*Same.*—The plaintiff, a loyal citizen of the United States residing in Germany during the World War, and whose property was seized by the Alien Property Custodian, held entitled to recover interest on a refund of an overpayment of income tax which had been paid in plaintiff's behalf by the Custodian.

*Interest on interest.*—A taxpayer entitled to recover interest on a refund of income tax may not, under the act of March 3, 1875, also recover interest on the interest recoverable on the refund.

*The Reporter's* statement of the case:

*Mr. John Enrietto* for the plaintiff. *Messrs. Charles D. Hamel, Brainard Avery,* and *Albert G. Avery* were on the briefs.

*Mrs. Elizabeth B. Davis,* with whom was *Mr. Assistant Attorney General Robert H. Jackson,* for the defendant.

The court made special findings of fact as follows:

1. The petition in this action was originally filed by Beta Isenberg May 5, 1930. Beta Isenberg was born in Bremen, Germany, in 1846, and in 1869 was married to Paul Isenberg. In 1874 Paul Isenberg became a naturalized citizen of Hawaii. In 1900, as a result of an act of Congress making citizens of Hawaii citizens of the United States, Paul Isenberg and his wife, Beta Isenberg, became citizens of the United States.

Prior to the death of her husband in 1903 Beta Isenberg had lived part of the time in Hawaii and the remainder of the time in Germany, having been in each of those places from time to time during that period. After her husband's death she did not return to Hawaii, but, except as indicated below, lived at No. 19 Contrascarpe, Bremen, Germany, in a house which her husband had purchased in 1884 and which she inherited from him at his death. She came to the United States from Germany in March 1923 to visit her daughter and returned in July 1923 with her daughter, going from the United States to England and continental Europe, including Germany. She returned to the United States in October 1923. Having been informed of the serious illness of her sister, she returned to Germany in May 1924. She remained in Germany from May 1924 until her death March 10, 1933, at Bremen. About 1925 she gave

her feeble condition and ill health as the reason for remaining in Germany.

Thereafter, by appropriate motion, George O. Castell, the duly appointed and acting ancillary executor under the last will and testament of Beta Isenberg, was substituted as plaintiff. The said George O. Castell is a citizen of the United States, has at all times borne true allegiance to the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the United States.

2. During the calendar year 1917 Beta Isenberg owned certain stocks and bonds of corporations doing business in the Territory of Hawaii. That property was then held for Beta Isenberg, under a power of attorney from her, by H. Hackfeld & Co., Ltd., an American corporation organized under the laws of California, with its principal place of business in Honolulu, Hawaii. December 31, 1917, the aforementioned corporation received for Beta Isenberg and credited to her account on its books certain income from such property.

3. February 27, 1918, the then Alien Property Custodian, pursuant to the Trading-with-the-Enemy Act (40 Stat. 411), seized and acquired all property of Beta Isenberg in Hawaii, including the income referred to in the preceding finding. That property was subsequently held and administered by the Alien Property Custodian under the designation "Trust No. 12,611", and, except for administration expenses (including Federal taxes), the proceeds of the property and net accretions thereto were returned by the Alien Property Custodian to Beta Isenberg in installments during the years 1926, 1927, and 1928, under the following circumstances:

April 17, 1925, Beta Isenberg, through her attorneys, filed a bill in equity in the Supreme Court of the District of Columbia against Frederick C. Hicks, Alien Property Custodian, and Frank White, Treasurer of the United States, under section 9 of the Trading-with-the-Enemy Act, as amended, for the return of her seized property. In said cause the Supreme Court of the District of Columbia entered a final decree February 20, 1926, for the return of the property and proceeds of the sale of all or any part thereof,

together with accretions thereto, income thereon, or increase thereof. The defendants noted an appeal from that decree, which appeal, on motion of the defendants, was dismissed April 8, 1926, prior to the hearing thereof.

**4.** March 31, 1924, the Alien Property Custodian, on behalf of Beta Isenberg, paid the collector of internal revenue for the district of Maryland $600,810.70 as Beta Isenberg's individual income tax for the calendar year 1919.

**5.** August 18, 1926, the Commissioner of Internal Revenue determined that Beta Isenberg's income tax for the calendar year 1919 had been overpaid in the amount of $450,783.52. That overpayment was paid to the Alien Property Custodian on behalf of Beta Isenberg in the manner hereinafter stated, and is not contested nor is it in controversy herein. Of the aforementioned overpayment the Commissioner credited $49,821.62 to additional assessments of income taxes against Beta Isenberg for the years 1921 to 1925, both inclusive; $2,695.15 to accrued interest on income taxes of Beta Isenberg for the years 1921 to 1923, both inclusive, and on September 1, 1926, refunded to the Alien Property Custodian on behalf of Beta Isenberg, $398,266.75.

**6.** Subsequently the Commissioner determined that interest was allowable to Beta Isenberg under section 1116 of the Revenue Act of 1926, on the overpayment for 1919 referred to in finding 5, in the amount of $60,757.21. There is no dispute as to the correctness of the interest computation. Of the foregoing amount of $60,757.21, $34,922.69 was paid to the Alien Property Custodian March 14, 1927, on account of Trust No. 12,611, for Beta Isenberg, and is not contested, nor is it in controversy herein. The balance of $25,834.52 is the amount here in controversy. Prior to making payment of the foregoing amount of $34,922.69 the Commissioner on December 1, 1926, scheduled the entire amount of $60,757.21 to the collector of internal revenue for the District of Hawaii, with the following directions:

> The following item representing interest allowed on overassessment for the year 1919 and covered by notice of interest allowance is listed on this schedule as the collector's authority to credit as much as necessary of the interest due to the taxpayer in connection with

her 1919 overassessment to outstanding tax and interest thereon due from the taxpayer for the year 1917 and to certify the balance for payment.

On the same day the assistant to the Commissioner wrote a letter to the collector of internal revenue for the district of Hawaii, stating in part as follows:

> Transmitted herewith is schedule 23115 carrying notice of interest allowance ($60,757.21), representing interest allowed to the above-named taxpayer [Beta Isenberg] on an overassessment for 1919 and certificate of overassessment ($28,680.00) for the year 1917. While it is not the general practice of this office to credit amounts allowed as interest, such action is contemplated in the instant case by reason of the fact that there appears to be delinquent tax outstanding for 1917 on which considerable amount of interest has accrued and which would soon become uncollectible by the expiration of the statutory period for its collection.

December 13, 1926, the collector carried out the aforesaid instructions and applied $19,094.83 of the interest allowance to an additional assessment of income tax against Beta Isenberg for the calendar year 1917, and $6,739.69 to interest on the additional assessment for 1917. That action was approved by the Commissioner by appropriate schedule under date of January 7, 1927.

On or about March 14, 1927, the Commissioner mailed to the Alien Property Custodian on behalf of Beta Isenberg a notice of interest allowance with respect to the overpayment for 1919, on which he showed that $25,834.52 of the interest allowed had been credited, as indicated above, against additional tax and interest for 1917. A check for $34,922.69, the balance of the interest allowance of $60,757.21, was included with the foregoing notice.

At the time the foregoing credits were made the statutory period for collection of any additional income tax from Beta Isenberg for the calendar year 1917 and interest thereon had expired.

June 23, 1927, attorneys for Beta Isenberg protested against the action of the Commissioner in making the credit of $25,834.52 against the additional income tax for 1917 and interest thereon and demanded refund and payment to

Beta Isenberg of the amount of $25,834.52 so applied by the Commissioner, on the ground that the collection of the amounts against which the credit had been made in said sum was barred by the applicable statute of limitations.

To that demand the deputy commissioner of internal revenue replied by letter dated February 11, 1928, in part as follows:

> * * * it is believed that in view of the great uncertainty as to the whole matter, no action toward making refunds should be taken by the Bureau in reliance upon the New York and Albany Literage Company decision, unless and until the situation is clarified by further court decisions or by legislative action. This applies equally to those cases in which overassessments have been credited to a year, collection of the outstanding tax for which may apparently be barred by the statute of limitations.

7. July 24, 1928, the assistant to the Commissioner instructed the collector of internal revenue for the district of of Hawaii as follows:

> The Income Tax Unit states that the credits were made after the expiration of the statute of limitations for collection and that further investigation disclosed that the entire interest represents an erroneous allowance in accordance with section 18 (e) of the Settlement of War Claims Act of 1928. It, therefore, will be necessary for you to reverse the credits totaling $25,834.52 applied to the December 1920 list # 22, and the December 1926 list no. 53019.
>
> Your accounts should be adjusted by debiting account 62 and crediting account 18. Please attach a copy of this letter to the form 820 on which this transaction is reflected. An appropriate notation should be made on your copies of the certificate of overassessment and the schedule. It also will be necessary for you to procure from the Alien Property Custodian a check for $34,922.69 covering the interest refunded. This check should be returned to this office to be deposited as a repayment to the appropriation from which drawn. A form 843 supported by form 53 should be prepared by your office to eliminate the outstanding liabilities as the result of this adjustment.

8. On or about August 7, 1928, the collector complied with the instructions set out in finding 7. The additional tax and

interest of $25,834.52 for the calendar year 1917 were thereafter duly abated. The Commissioner refused to pay the said interest of $25,834.52 theretofore allowed to Beta Isenberg, on the ground that section 18 (e) of the Settlement of War Claims Act of 1928 prohibited him from making any payment of interest to said Beta Isenberg or on her behalf.

Counsel for Beta Isenberg thereafter duly protested against said action of the Commissioner but the Commissioner has continuously refused to make payment of the said amount of $25,834.52 or any part thereof.

The court decided that plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff is an executor of the estate of Beta Isenberg, a loyal citizen of the United States, who died March 10, 1933, in Bremen, Germany, where she had resided continuously since the year 1903.

After the United States declared war against Germany, the Alien Property Custodian, acting under the provisions of the Trading with the Enemy Act, 40 Stat. 411, seized certain stocks and bonds belonging to Beta Isenberg. On April 17, 1925, Beta Isenberg brought suit in the Supreme Court of the District of Columbia for the return of her property, and in a final decree dated February 20, 1926, that court ordered that her property together with accretions be returned to her.

In the year 1924 the Alien Property Custodian paid to the United States on behalf of Beta Isenberg the amount of $600,810.70 as income taxes for the year 1919. In 1926 the Commissioner decided that an overpayment had been made in the amount of $450,783.52 which was accordingly paid to Beta Isenberg.

Subsequently the Commissioner determined that Beta Isenberg was entitled to interest on this overpayment in the amount of $60,757.21. Of this amount, $34,922.69 was paid to Beta Isenberg but the remaining amount of $25,834.52 was applied as a credit on delinquent taxes for 1917 and interest thereon. Against this action, Beta Isenberg pro-

Opinion of the Court

tested on the ground that the collection of taxes for the year 1917 was barred by the statute of limitations. This protest was sustained and the Commissioner reversed the credit but refused to pay her the $25,834.50 on the ground that section 18 (e) of the Settlement of War Claims Act of 1928 prohibited said payment. The plaintiff, as executor of the estate of Beta Isenberg, now brings suit to recover the sum so withheld.

Section 2 (a) of the Trading with the Enemy Act provides:

> Sec. 2. That the word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual * * * resident within the territory * * * of any nation with which the United States is at war, * * *.

The Settlement of War Claims Act of 1928, 45 Stat. 254, provides in section 18 for the amendment of section 24 of the Trading with the Enemy Act and subdivision (e) of section 18 reads as follows:

> (e) In case of any internal-revenue tax imposed in respect of property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax.

The only question in the case is whether the provisions above set forth are applicable and prohibit the payment of the interest in controversy.

The Trading with the Enemy Act became a law October 6, 1917. The Settlement of War Claims Act was adopted in 1928. In determining the proper construction of these acts it is necessary not only to consider the language used but also the purpose of these acts in connection with the circumstances to which they are applicable.

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After the war was over and before the War Claims Settlement Act was passed, the courts decided that where the property of a loyal citizen of the United States or a citizen of a neutral country had been seized, the owner could bring a suit against the Alien Property Custodian to have his property restored to him. After the War Claims Settlement Act was passed, questions arose as to the extent of its application and in particular as to whether it had any application to cases involving property other than that of an alien enemy. The case of *Escher* v. *Woods*, 281 U. S. 379, although not decided under the War Claims Settlement Act having been begun in 1921, was one in which property owned by a citizen of Switzerland had been mistakenly seized by the Alien Property Custodian and instead of returning the property in its entirety the Custodian sought to deduct expenses incurred in connection therewith under general provisions contained in presidential orders and the act of March 4, 1923. But the Supreme Court held that—

> all of these provisions naturaly are interpreted to refer to property that the Custodian is entitled to hold. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution.

In line with this statement it may be said that it would be extraordinary if a loyal citizen of the United States whose property had been seized and who had undergone the misfortune of having it withheld from him for a long period should, when the Government had already done him an injury for which he could recover no damages, be still further injured by being denied the benefits of statutory provisions to which he would have been entitled if the Government had not assumed the custody of his property. Obviously no good reason can be given why he should be so treated nor why Congress should have intended such a result.

The converse of this proposition was before the court in the case of *U. S. ex rel. I. G. Farbenindustrie Aktiengesellschaft* v. *Burnet*, 65 Fed. (2d) 195. In that case an alien enemy whose property had been seized by the Alien Property Custodian contended that he was entitled to interest on an overpayment in respect of income tax collected from the Alien Property Custodian. The overpayment was refunded but the Commissioner applying section 18 (e) refused to pay any interest on the overpayment, holding that the provisions of the revenue act of 1928 did not apply. The court, construing the War Claims Settlement Act and speaking with reference to the property of alien enemies which had been seized, said:

> Congress * * * was legislating alone in respect of that class of property and of that class of ownership.

and further that—

> Section 24 [18] (e) placed a limitation upon the payment of interest on taxes refunded under the Settlement of War Claims Act, which related to the special subject of the settlement of "claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian." The Settlement of War Claims Act embraced all of these subjects, and was in the nature of a final disposition thereof. Congress was here treating with a separate and individual matter unrelated to the Revenue Act of 1928, which contained no reference to the prior act or sought to repeal any of the provisions contained therein.

The question here decided was specifically ruled upon in the case of *U. S. ex rel. Escher et al.* v. *Burnet* (not reported). A summary of this decision is found in 1931 C. C. H., par. 9456. In this case the court held that section 24 [18] (e) upon which plaintiff relies did not apply where property of a friendly alien had been wrongfully seized; *a fortiori* it would not apply where the property of an American citizen had been wrongfully seized.

As before stated, Beta Isenberg filed a bill in equity on April 17, 1925, in the Supreme Court of the District of

Columbia against the Alien Property Custodian and the Treasurer of the United States for the return of her seized property and that court rendered a final decree February 20, 1926, for the return of the property or the proceeds of its sale and any accretions thereto. When this suit was begun against the Alien Property Custodian he was acting as the agent for the Government and a judgment against him would also be conclusive against the United States. See *Escher, Admr.*, v. *United States*, 68 C. Cls. 473 (certiorari denied). By this judgment the court also held in effect that Beta Isenberg was not an enemy but a loyal citizen of the United States. Otherwise she had no right of recovery, and she must be so treated in the case now before us. It is so clear that Beta Isenberg when in fact a loyal citizen could not be made a hostile enemy by legislative act that we can not assume Congress so intended. The main purpose of the Trading with the Enemy Act was to provide for the seizure not only of property which belonged to those who were actually enemies, but also of those who might be enemies or who themselves would be more or less under the control of enemies. We conclude that in applying the term "enemy" to all individuals residing within enemy territory, Congress intended and meant that for the purpose of seizing property and keeping it in custody until its status could be determined such persons were to be regarded as enemies.

We do not think that *Faber* v. *United States*, 81 C. Cls. 142, (10 Fed. Supp. 602), when the claims of the plaintiff and the basis of the court's decision are considered, can be deemed an authority to the contrary.

In the case last cited the plaintiff was executor of the estate of a nonresident citizen of the United States whose property had been seized by the Alien Property Custodian, who, on the death of the testatrix, paid to the United States an estate tax which was in part determined by the inclusion of certain administrative expenses. Thé plaintiff in the case made an altogether different contention from that raised in the case at bar and the questions submitted to and determined by the court were also entirely different. It

was claimed by the plaintiff in that case that, after the property was seized, the testatrix was not the owner of any estate in the United States, title and possession being in the Alien Property Custodian. For this reason it was argued that it was not subject to tax under the revenue acts in force at that time. It was also contended that section 403 (b) (1) of the revenue act of 1918 relating to deductions which were allowed in computing estate taxes was unconstitutional as applied to a nonresident citizen of the United States for the reason that while the property was in the custody of the Alien Property Custodian the plaintiff was not the owner thereof. This last objection was, as the opinion in the case states, "the gravamen of the complaint" and its validity depended upon the status of the property while in the hands of the Alien Custodian. The court in considering the effect of the seizure correctly held that the position of the testatrix "*in war times*" [italics supplied] under the Trading with the Enemy Act was the same as though she had been an alien enemy, but that the title to the property seized did not become vested in the United States, and that the provisions of the revenue act of 1918 were not unconstitutional. In other words, that under its war powers the Government could take custody of the property, but as held by other courts the Government acquired only a possessory right for the time being and the ownership of the property was not lost. No principle was laid down which would conflict with the construction which we have given to the Trading with the Enemy Act.

It is contended on behalf of the defendant that the provisions of the War Claims Settlement Act forbidding the payment of interest on any refund of taxes when property has been seized are general and absolute and that as the property of plaintiff was lawfully seized these provisions must apply. This, we think, must depend upon the construction of the War Claims Settlement Act when considered in the light of the surrounding circumstances and the purpose intended to be effectuated by it. In determining this question it must not be forgotten that the plaintiff's intestate was not an alien enemy but a loyal citizen and, as

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said by Mr. Justice Holmes in *Escher* v. *Woods*, *supra*, the property was "mistakenly seized" and the possession acquired was one "that the law requires him [Alien Custodian] to surrender." The War Claims Settlement Act was primarily intended to deal with the claims of alien enemies whose property had been seized. It involved such difficult questions and such a great amount of money or property, that the rights of loyal citizens, as to which there was no dispute, appear to have been treated as not being affected by its provisions. The failure to specially exempt the property of loyal citizens from the provisions of a bill designed to dispose of property of alien enemies does not, we think, show that the War Claims Settlement Act was intended to apply to the property of citizens of the United States which had been mistakenly seized. The language used in *Escher* v. *Woods*, *supra*, that "all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold" is equally applicable to the provisions of the War Claims Settlement Act now under consideration and it follows that plaintiff is entitled to recover.

What we have said above makes it unnecessary that we should determine whether plaintiff had any vested rights in the interest which he seeks to recover or whether the provision in question if given the construction contended for by defendant would be constitutional when applied to loyal citizens of the United States. It must be conceded that the Government can grant or withhold interest as Congress sees fit to provide and also that it may discriminate between residents and nonresidents as classes, but the classification made for such purposes must be reasonable and it would seem that to allow interest to loyal citizens whose property had not been seized and deny it to those whose property had been seized would be an arbitrary and capricious discrimination. If we are correct in this, it furnishes an additional reason for holding that Congress did not so intend.

Plaintiff seeks to recover not only the balance of the interest which had accrued on the refund, amounting to

$25,834.52, but also interest on this sum from January 7, 1927, to March 3, 1933. This claim for interest on interest is based on the act of March 3, 1875, as amended by the act of March 3, 1933. But we do not think this statute has any application to the case. It will be observed that the Commissioner in his first action allowed the interest on the refund, paid part of it and credited the balance now in suit upon other taxes. Subsequently he reversed his ruling with reference to the credit of the taxes and held that he was restrained from making any further payment of interest by the provisions of the War Claims Settlement Act. We need not determine whether this last ruling had the effect of setting aside the one that he had first made. In either event the case is not covered by the language of the statute and plaintiff's claim for interest on interest must be denied.

Plaintiff is entitled to recover $25,834.52, for which a judgment in his favor will be entered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

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## THE OLIVER TYPEWRITER CO. v. THE UNITED STATES

[No. L-294. Decided May 4, 1936]

*On the Proofs*

*Munitions tax; additional assessment; jurisdiction of court; sufficiency of claim for refund.*—Suit cannot be maintained for refund of munition taxes paid for the year 1916 based upon a claim for deduction of the taxes as an accrued expense for the year where no mention of this item or ground for refund was made in the taxpayer's claim for refund.

*Claim for refund; protest not equivalent to refund claim.*—The fact that a written protest had been made by the taxpayer against the disallowance by the Commissioner of Internal Revenue of a claimed deduction in connection with a proposed additional assessment does not satisfy the statutory requirement that in order to maintain suit for refund the grounds made the basis of the suit must have been set forth in a timely claim for refund after the payment of the tax.

Reporter's Statement of the Case

*Assessment and collection of munitions tax; when tax due; statutes of limitation.*—The Revenue Act of 1916 providing for the munitions tax placed no limitation upon the time for determination, assessment, and collection of the tax. Under the tax laws, including the limitation of section 1322 of the Revenue Act of 1921, such taxes became due when the Commissioner of Internal Revenue made his final determination and assessment and notified the taxpayer thereof, and assessment and collection were not barred by the statutes of limitation if made within four years of such determination and notice.

*Reinvestigation and reassessment by Commissioner of Internal Revenue.*—The Commissioner of Internal Revenue is not limited to one investigation or audit of the tax return, or to one determination or assessment thereon, but may, within statutory limitations, reinvestigate, redetermine, or reassess the taxes due by the taxpayer.

*Allocation of amortization allowances.*—Where munitions-manufacturing facilities were both purchased and used during the years 1915, 1916, and 1917, the allocation by the Commissioner of Internal Revenue of a portion of the amortization allowances on such facilities to the year 1915 was not erroneous as giving an unintended retroactive effect to the munitions-tax statute.

*Amortization allowance by Commissioner of Internal Revenue; burden of proof to show error.*—The burden of proof to show error in an amortization allowance by the Commissioner of Internal Revenue rests upon the taxpayer alleging error, and upon failure of the proof to establish error, the Commissioner's allowance must stand.

*The Reporter's* statement of the case:

*Mr. Leo H. Hoffman* for the plaintiff. *KixMiller, Baar & Hoffman*, and *Mr. Robert W. Knox* were on the brief.

*Mr. John W. Blalock*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

Plaintiff filed a claim for refund of $2,256.32, with interest, additional assessment of munition manufacturer's tax for the calendar year 1916, on the grounds, first, that the assessment and collection of that additional assessment were barred by the statute of limitation; and, second, that the portion of amortization computed by the Commissioner of Internal Revenue under section 302 (f) of Title III of the

Revenue Act of 1916, entitled "Munition Manufacturer's Tax", and allocated to the year 1915 should have been allocated to and allowed as deductions from munitions profits for 1916 and 1917 in determining the amount of profits subject to the munitions tax of 12½ percent. This additional tax was assessed May 27, 1924, and was paid by credit made June 2, 1925. There were other assessments which will be referred to in the findings. After suit in this court had been timely instituted upon the rejected refund claim, plaintiff filed two amended petitions seeking, in the last, to recover a total of $19,960.75, alleged overpayment of munitions tax for 1916 with interest.

The second amended petition set forth two additional items not included in the original petition. In respect of these two items, which will be set out in more detail in the opinion, the defendant insists plaintiff cannot recover because they were not set forth in the claim for refund. The defendant also insists that the plaintiff is not entitled to recover any amount on the grounds specified in its claim for refund as above stated.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. During the years 1915, 1916, and 1917, plaintiff was engaged in the manufacture and sale of munitions and kept its books on the accrual basis. March 1, 1917, it filed a munitions tax return for 1916 showing a tax liability of $88,730.43 which was assessed April 24, 1917, of which assessment plaintiff was duly notified and the amount was paid May 12, 1917. In this return plaintiff claimed amortization of $186,452.89 for buildings and machinery specially constructed or installed for use in the manufacture of munitions. The deduction so claimed in the return for 1916 was determined on a basis of cost of $322,749.53 less estimated salvage value of $74,145.69.

The Commissioner of Internal Revenue, in his final decision of April 8, 1924, on this question, determined that for the purpose of the deductions authorized by section 302 (f), Title III of the Revenue Act of 1916, the cost of property

used for the manufacture of munitions acquired in 1915 was $239,798.95 and that the cost of such property acquired in 1916 was $150,515.26.

**2.** After the filing of the munitions tax return for 1916 a revenue agent made an examination and audit of plaintiff's books and records for the purpose of verifying its 1916 munitions tax return and made a report to the Commissioner recommending assessment of an additional tax of $24,463.12, whereupon the Commissioner on August 29, 1917, mailed to plaintiff a letter proposing to assess this additional munitions tax for 1916 and advising plaintiff at the same time that it had thirty days under the provisions of section 306 of the 1916 Act within which to file a written request for a hearing. In this communication the Commissioner requested plaintiff that if it did not desire to make objection to the proposed additional tax he be notified in order that the case might be closed as soon as possible. Upon receipt of this letter, plaintiff, on August 31, 1917, wrote the Commissioner requesting that he furnish it with a statement of the items making up the proposed additional tax of $24,463.12, together with such explanation as might be necessary for a full understanding of the same. Accordingly, on September 8, 1917, the Commissioner wrote plaintiff that the proposed additional tax resulted from the disallowance of the following claimed deductions for 1916:

| | |
|---|---|
| Price adjustment in 1917 (not allowable for 1916) | $21, 170. 00 |
| Departmental rental | 51, 000. 00 |
| Accrued munitions taxes not paid in 1916 | 88, 730. 43 |
| Excessive amortization | 34, 804. 55 |
| Total | 195, 704. 98 |

September 14, 1917, plaintiff wrote the Commissioner concerning the proposed additional tax, explaining its reasons for claiming the deductions which the Commissioner had tentatively disallowed. This letter concluded with the request that the munitions tax return as filed for 1916 be accepted and that no additional tax be assessed. Thereafter, on October 2, 1917, plaintiff transmitted to the Commissioner, with a letter of that date, a detailed affidavit setting forth the facts with reference to the "price adjust-

ment" item of $21,170. After consideration thereof the Commissioner, on October 9, 1917, wrote plaintiff that inasmuch as the information submitted showed that the price adjustment item of $21,170 was an expense actually paid in connection with the income reported for 1916, it would be allowed as a deduction in arriving at the net profits for the year, but that the other claimed deductions for "departmental rental", "accrued munitions taxes for 1916", and "excessive amortization" were disallowed with the result that the additional tax theretofore proposed was reduced to $21,816.87. In reply to this proposed additional assessment, plaintiff, on October 13, 1917, wrote the Commissioner asking him to reconsider his decision and stated that "In view of the changes made by the recent act, it seems that an injustice will be the result if the proposed course is followed out in connection with the tax item of $88,730.43 and the amortization item of $34,804.55." In reply the Commissioner on October 17, 1917, advised plaintiff as follows:

> In reply to your letter you are advised that the matter had been given very careful attention and consideration by this office before the letter referred to above was written, and, as you have been advised, the consistent ruling in regard to taxes has been that only the tax actually paid during the year 1916 in connection with the manufacture of munitions constituted an allowable deduction in arriving at the net profits to be reported under the provisions of the title referred to above. A reserve for munitions tax or accrued munitions tax cannot be taken into account in determining such net profits.
>
> As you were advised heretofore, it was held that the amortization applicable to assets acquired particularly for the manufacture of munitions should be spread over the entire life of such assets and consequently the additional tax referred to in office letter of the 9th instant is due from your corporation and should be paid to the collector of internal revenue of your district upon demand therefor.

Thereafter on November 1, 1917, the proposed additional tax of $21,816.87 was assessed, of which assessment plaintiff was duly notified. This additional assessment was paid

December 31, 1917. However, the Commissioner continued his consideration of the munitions tax liability for 1916 in connection with the contentions of plaintiff as above mentioned and upon information submitted to him by plaintiff. During such consideration the year 1917 was taken up for audit and decision. The matter proceeded in this manner until March 4, 1924, when the Commissioner, after consideration of the statements of facts and other information furnished, mailed plaintiff a letter stating in part as follows:

> Reference is made to sworn statement of facts submitted by you relative to the adjustment of your munitions manufacturers' tax, of which you were advised in office letter of December 21, 1922.
>
> The evidence submitted by you has been given careful consideration in this office and the adjustments shown in the attached statement made.

This letter further advised plaintiff of a proposed overassessment of $661.60 for 1916, stating that a refund thereof was barred by limitation and, in addition, proposed an additional tax of $2,074.86 for 1917, the proposed overassessment for 1916 resulting from the allowance of an increased deduction for amortization of $5,292.83 and the proposed additional tax for 1917 resulting from a disallowance of $20,748.54 of amortization of $103,375.24 claimed in the munitions tax return for that year. This letter contained schedules disclosing in detail the method of computation employed in arriving at the deductions allowable on account of the property used for the manufacture of munitions. The amortization determined by the Commissioner in this letter to be attributable to the munitions properties acquired in 1915, 1916, and 1917, on the basis of receipts for munitions manufactured in those years, was $15,455.71 for 1915, $156,941.17 for 1916, and $86,626.70 for 1917.

Plaintiff appealed from the determination of the Commissioner as set forth in the above-mentioned letter of March 4, 1924, to the committee on appeals and review under the provisions of section 250 (d) of the Revenue Act of 1921, and requested a hearing. That committee heard plaintiff, considered its appeal, and rendered to the Com-

missioner its decision wherein certain changes were made in the determination as set forth in the Commissioner's letter of March 4, from which the appeal was taken. The changes made by the committee related to the amount of amortization to be attributed to and charged against the munitions property for the period from 1915 to 1917, inclusive. The salvage values of properties in 1917 when the manufacture of munitions ceased, which properties had been acquired principally in 1915 with additional acquisitions in 1916 and 1917 after proper adjustments for transfers, were reallocated by the committee. The cost of acquisition in 1916 was increased with the result that the amortization which the committee decided should be allocated to and charged against the property acquisitions in the years 1915 to 1917, inclusive, together with the disallowance of $67,569.48 for special jigs and gauges erroneously charged to expense, produced an additional tax of $2,256.32 for 1916 instead of an overassessment of $661.60 as proposed by the Commissioner in his letter of March 4, 1924, and an overassessment of $2,260.05 for 1917 instead of an additional tax of $2,074.86 for 1917 as proposed by the Commissioner. The year 1917 is not in controversy here. Upon this decision of the committee on appeals and review the Commissioner on May 27, 1924, assessed the additional tax of $2,256.32 for 1916, of which assessment plaintiff was duly notified. This additional assessment was collected by a credit allowed on June 2, 1925, of that amount of an overpayment of income tax for 1918. Before the credit just mentioned was made, however, the Commissioner on October 30, 1924, notified plaintiff that he had determined a further additional munitions tax to be due for 1916 in the amount of $3,886.02. The record does not disclose whether plaintiff objected to this determination or whether it requested a hearing thereon. The additional amount so determined to be due was assessed on February 13, 1925, of which assessment plaintiff was notified. The amount of $2,210.41 thereof was collected by the credit of June 2, 1925, of a portion of an overpayment of income tax for 1918 and the balance of $1,675.61 was collected by a like credit at the same time of a portion of an

overpayment of income tax for 1917. The adjustments upon which the determination and assessment of the additional munitions tax of $3,886.02 in February 1925 were based are not disclosed by the record, but that additional assessment did not result from any change in the amortization deductions for 1916 in respect of properties acquired and used in the manufacture of munitions.

3. One of the claims of plaintiff in this suit is that in determining its munitions tax liability for 1916 the Commissioner should not have allocated to 1915 any portion of the cost, less salvage, of the property acquired and used for the manufacture of munitions, but that the cost of such property, less the salvage value thereof when the manufacture of munitions ceased in 1917, should have been allocated altogether to and allowed as deductions under section 302 for the years 1916 and 1917 because section 302 of the Revenue Act of September 8, 1916, relating to deductions for amortization of such property, had no application to the year 1915.

The facts with reference to the cost of such munitions properties in the years in which acquired, the salvage value thereof, and the remaining costs to be considered in the determination of the deductions allowable under section 302 (f), which were considered and used by the Commissioner in determining the munitions tax due for 1916, are as follows: During the years 1915, 1916, and 1917, plaintiff acquired certain facilities for the manufacture of munitions. The cost of such facilities when acquired in these years, less salvage value of $71,487.51 when the manufacture of munitions ceased in 1917, was $322,593.06, determined as follows:

| Year | Cost | Salvage | Amortizable cost |
|---|---|---|---|
| 1915 | $239, 798. 95 | $43, 500. 29 | $196, 298. 66 |
| 1916 | 150, 515. 26 | 27, 304. 01 | 123, 211. 25 |
| 1917 | 3, 766. 36 | 683. 21 | 3, 083. 15 |
| | 394, 080. 57 | 71, 487. 51 | 322, 593. 06 |

The Commissioner amortized these costs over the years 1915, 1916, and 1917, allocation being made to each of the three years in the ratio which the production of munitions

of each year bore to the total production for the period of three years. The production of munitions was as follows:

| Year | Production | Percentage |
|---|---|---|
| 1915 | $408, 524. 03 | 0. 08252 |
| 1916 | 3, 012, 692. 06 | . 60853 |
| 1917 | 1, 529, 550. 00 | . 30895 |
| | 4, 950, 766. 09 | 1. 00000 |

The Commissioner on April 8, 1924, as a result of the decision of the committee on appeals and review as hereinbefore mentioned, applied these percentages against the cost of the facilities, less salvage, acquired in each of the three years, as follows:

| Cost | Percentage | 1915 | 1916 | 1917 |
|---|---|---|---|---|
| *1915* | | | | |
| $196, 298. 66× | 0. 08252= | $16, 198. 57 | | |
| 196, 298. 66× | . 60853= | | $119, 453. 62 | |
| 196, 298. 66× | . 30895= | | | $60, 646. 47 |
| *1916* | | | | |
| 123, 211. 25× | . 6632= | | 81, 713. 70 | |
| 123, 211. 25× | . 3368= | | | 41, 497. 55 |
| *1917* | | | | |
| 3, 083. 15× | 1. 0000= | | | 3, 083. 15 |
| | | 16, 198. 57 | 201, 167. 32 | 105, 227. 17 |

As a result the deduction for 1916 for amortization under section 302 was increased from $156,941.17, as previously allowed, to $201,167.32, an increased allowance of $44,226.15, but, at the same time, the taxable profits for 1916 were increased in the amount of $67,569.48 over the profits previously determined as a result of the disallowance of an expense deduction claimed by plaintiff in 1916 for special jigs and gauges. The additional tax of $2,256.32 resulting from these adjustments was assessed and paid as hereinbefore mentioned.

Had the Commissioner applied to the munitions property acquired in 1915 the same ratio of spread of the amortizable cost (cost, less salvage), for 1916 and 1917 as was applied by him to the munitions property acquired in 1916, the

deduction for 1916 would have been $211,898.97, and $107,610.94, for 1917 determined as follows:

| Year | Amount | 1915 | 1916 | 1917 |
|---|---|---|---|---|
| 1915 | $196,298.66×0.00 = | None | | |
| | 196,298.66× .6632= | | $130,185.27 | |
| | 196,298.66× .3368= | | | $66,113.39 |
| 1916 | 123,211.25× .6632= | | 81,713.70 | |
| | 123,211.25× .3368= | | | 41,497.55 |
| | | | 211,898.97 | 107,610.94 |

Had this method been followed, the additional tax of $2,256.32 for 1916 would have been reduced to $914.86, a difference of $1,341.46.

4. November 6, 1925, plaintiff filed a claim for refund of $2,256.32 for 1916. Item 6 of this claim, as filled in by plaintiff, stated: "Amount to be refunded (or such greater amount as is legally refundable) $2,256.32 & int." The amount of $2,256.32 claimed by plaintiff to be refundable was shown on item 7 of the claim to have been assessed in May 1924 and paid by credit. The reasons or grounds set forth by plaintiff in this claim for refund were as follows:

> 1. The Statute of Limitations had run against the collection of the item of $2,256.32 prior to the time of assessment or credit.
>
> This conclusion is based on sections 1322 and 1320 of the Revenue Act of 1921. Section 1322 provides that all internal revenue taxes excepting the income and profits taxes shall be assessed within four years after such taxes became due. Section 1320 provides that no suit or proceeding for the collection of any internal revenue tax, except income and profits tax, shall be begun after the expiration of five years from the time such tax was due. * * *
>
> 2. A portion of the deduction for amortization allowed for munitions tax purposes was allocated to 1915. This portion should have been allocated to 1916 and 1917 because the Department's allocation to 1915 gives a retroactive effect to the Munitions Act when none was intended and denies the taxpayer a substantial deduction for munitions tax purposes where one was intended.

After a discussion of various cases and rulings the claim for refund concluded as follows:

> From the foregoing quotation it is apparent that the period over which amortization is allowed is the period

beginning with the effective date of the Revenue Act of 1918 and ending when the war uses provided for had ceased. A similar construction must be given the amortization provision in the munition manufacturer's tax, namely, the period over which the entire cost less depreciation up to January 1, 1916, must be amortized begins January 1, 1916, the effective date of that act, and ends when the war uses had ceased. In the instant case the war uses had ceased in 1917 when the taxpayer discontinued the manufacture of munitions.

We therefore cannot escape the conclusion that the allocation of amortization as made by the taxpayer on its return for munitions tax purposes is proper and should be allowed as a deduction in 1916 and 1917.

**5.** In rejecting this claim on October 25, 1928, the Commissioner adhered to his decision as hereinbefore set out with reference to the allowable amortization deduction in 1916 on account of property used in the manufacture of munitions, and advised plaintiff of his position on the question of the statute of limitation with respect to the assessment and collection of the additional tax of $2,256.32, the refund of which had been claimed, as follows:

> The claim is based on the statement that the statute of limitations had run, and barred the further assessment of any additional tax.
>
> A statement as to limitation for the assessment of munitions tax is set forth in Appeals and Review Recommendation 4519, Cumulative Bulletin II–2, page 236. That ruling shows how the committee arrives at the determination that "the munitions tax is not due until after determination by the Commissioner of the amount of the tax and assessment and notice thereof." It appears from the file that the final determination of the amount of tax was not made by the Commissioner until the date of mailing the final notice on April 8, 1924.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

In the original petition filed herein plaintiff sought to recover the amount of $2,256.32, which was the amount of the second additional assessment for 1916 made on May 27, 1924, and collected by a credit allowed June 2, 1925. The

grounds alleged in the original petition for the recovery of this amount were that it had been collected after the period of limitation for assessment and collection and that the Commissioner had erred in his determination as to the amortization deduction for 1916. This amount had been specified as an alleged overpayment in a timely claim for refund filed with the Commissioner November 6, 1925, which alleged, first, that the statute of limitation had run against the collection of that amount prior to the time of assessment or credit and, second, that the Commissioner had erred in allocating to 1915 a portion of the amortization of properties acquired and used in 1915 for the manufacture of munitions, and that the entire amortizable cost (original cost less salvage) should have been allocated to and allowed as deductions in 1916 and 1917. Refund of the overpayment for 1916 resulting from such alleged erroneous allocation was claimed.

The additional assessments for 1916 of $21,816.87, made November 1, 1917, and $3,886.02, made February 13, 1925, were not specifically mentioned in this claim for refund but a portion of the first additional assessment of $21,816.87, the exact amount not being disclosed by the record, resulted from the disallowance of a portion of the amortization of munitions property claimed in the return for 1916. However, the amortization deduction finally allowed by the Commissioner for 1916 exceeded the deduction claimed in the return by $14,714.43. In the final analysis only $1,341.46 of the total additional tax assessed and paid for 1916 resulted directly from the alleged erroneous allocation of the amortizable costs of properties acquired in the years 1915 to 1917, inclusive. The remainder of the total of the three additional assessments mentioned resulted from other adjustments made by the Commissioner, none of which was specifically mentioned in the claim for refund upon the rejection of which this suit is based.

Two amended petitions were filed in this court. In the second amended petition an overpayment of $19,960.75 was alleged for 1916, for which judgment was sought with interest. This petition set forth two additional items in support of the claimed overpayment, which items had not been specified in either the original petition or in the claim

for refund, as follows: (1) The amount of $3,886.02 assessed in February 1925 and collected by credit June 2, 1925, alleged to have been barred by the statute of limitation when assessed and collected; and (2) such amount as may be legally refundable as the result of the alleged error of the Commissioner in refusing to allow as a deduction in determining net profits subject to tax for 1916 the amount of the munition manufacturer's tax accrued for 1916.

The claim for refund, the disallowance of which must form the basis for suit to recover any internal revenue tax, did not include in either of the grounds stated the claim that the additional assessment of $3,886.02 was barred by the statute of limitation. The first ground of the refund claim specified only the additional assessment of $2,256.32 as being barred. However in view of our conclusion hereinafter stated that the additional assessment of $2,256.32 was not barred when collected, it is unnecessary to discuss the question whether suit can be maintained to recover the additional assessment of $3,886.02 which was collected at the same time. We are of opinion that no recovery can be had in respect of item (2) mentioned above relating to the deduction for 1916 of the total munition manufacturer's tax found to be due by the Commissioner. The 1916 tax is now claimed as a deduction for 1916 on the ground that it was a proper accrued expense for that year under section 302 (d). No mention of this item was made in the claim for refund. It is clear, therefore, that plaintiff cannot maintain suit in respect of the claimed deduction of the munitions tax as an accrued expense for 1916. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *Electric Power & Light Corp.* v. *United States*, 76 C. Cls. 379, 390, 391. Plaintiff insists that it is entitled to maintain this suit to recover any overpayment which would result from the allowance of a deduction of the tax for 1916 from income for that year, for the reason that when the Commissioner disallowed the deduction and proposed to assess, and did assess, an additional tax by reason of such disallowance, it filed a written protest against such proposed disallowance prior to the making of the additional assessment, which protest the Commissioner had before him in his files when he considered and rejected the claim for refund October 25, 1928. But the fact that a written protest had been made

against the disallowance of the deduction in connection with the proposed additional assessment does not satisfy the statutory requirement that in order to maintain suit the grounds made the basis of such suit must have been set forth in a timely claim for refund after payment of the tax. *United States* v. *Felt & Tarrant Co., supra; Electric Power & Light Corp.* v. *United States, supra.*

This leaves for consideration the two items set forth in the claim for refund: (1) Was the additional assessment of $2,256.32 made by the Commissioner May 27, 1924, and collected by credit June 2, 1925, barred by the statute of limitation? (2) Was the allowance made by the Commissioner as a deduction for 1916 for amortization of values of buildings and machinery under section 302 (f) of the Revenue Act of 1916 reasonable?

In view of the provisions of sections 304, 305, and 306 of Title III of the revenue act of September 8, 1916, we think the additional munitions tax of $2,256.32 was not barred at the time it was assessed and collected. Unlike the provisions of sections 8 (b), 9 (a), 13 (b), and 14 (a) of Title I of the Revenue Act of 1916 relating to income tax, the above sections of Title III relating to munitions taxes did not specify the date when the Commissioner should notify the taxpayer of the amount of tax for which it was liable or specify the period within which he could discover and assess any tax determined to be due for the years for which returns were required to be filed. Section 9 (a) of the Revenue Act of 1916 provided that the income tax imposed by Title I should become due and payable on June 15 following the making of the return on March 1 after the close of the taxable period on December 31 of the preceding year and that the Commissioner had three years within which he might make additional assessments. Section 14 (a) contained similar provisions as to corporations. *Stange* v. *United States*, 282 U. S. 270, 274; *Aiken* v. *Burnet*, 282 U. S. 277, 280; *Brown & Sons Co.* v. *Burnet*, 282 U. S. 283, 286. Section 304 of the munitions tax title provided that persons engaged in the manufacture of munitions should make a return on March 1 to the collector for the district in which the taxpayer had its principal office, setting forth the gross

amount of income derived or accrued from the sale or disposition of munitions; and section 305 provided that all such returns should be transmitted forthwith by the collector to the Commissioner who should, as soon as practicable, assess the tax found to be due and notify the person making such return of the amount of tax for which such person was liable and that such person should pay the tax to the collector on or before thirty days from the date of such notice. This section related only to the tax determined by the Commissioner on the face of the return. With respect to assessments of additional tax, section 306 provided that should the Commissioner have reason to be dissatisfied with the return as made, he was authorized to make an investigation and to determine the amount of net profits and might assess the proper tax accordingly. This section further provided that the Commissioner should notify the person making such return and that he should proceed to collect the tax in the same manner as provided in Title III, unless the person so notified should file a written request for hearing with the Commissioner within thirty days after the date of such notice.[1]

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[1] SEC. 304. On or before the first day of March, nineteen hundred and seventeen, and the first day of March in each year thereafter, a true and accurate return under oath shall be made by each person manufacturing articles specified in section three hundred and one to the collector of internal revenue for the district in which such person has his principal office or place of business, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth specifically the gross amount of income received or accrued from the sale or disposition of the articles specified in section three hundred and one, and from the total thereof deducting the aggregate items of allowance authorized in section three hundred and two, and such other particulars as to the gross receipts and items of allowance as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may require.

SEC. 305. All such returns shall be transmitted forthwith by the collector to the Commissioner of Internal Revenue, who shall, as soon as practicable, assess the tax found due and notify the person making such return of the amount of tax for which such person is liable, and such person shall pay the tax to the collector on or before thirty days from the date of such notice.

SEC. 306. If the Secretary of the Treasury or the Commissioner of Internal Revenue shall have reason to be dissatisfied with the return as made, or if no return is made, the commissioner is authorized to make an investigation and to determine the amount of net profits and may assess the proper tax accordingly. He shall notify the person making, or who should have made, such return and shall proceed to collect the tax in the same manner as provided in this title, unless the person so notified shall file a written request for a hearing with the commissioner within thirty days after the date of such notice; and on such hearing the burden of establishing to the satisfaction of the commissioner that the gross amount received or accrued or the amount of net profits, as determined by the commissioner, is incorrect, shall devolve upon such person.

Opinion of the Court

Section 1322 of the Revenue Act of 1921, which was in force at the time the additional munitions tax involved in this case was assessed and collected, provided that all internal revenue taxes, except as provided in section 250 of that act relating to income taxes, should "be assessed within four years after such taxes became due." This provision of section 1322 was continued without change in the limitation provisions in the revenue acts of 1924, 1926, and 1928.

A study of sections 304, 305, and 306 of the munitions tax, Title III of the act of 1916, in the light of the limitation provisions as to assessments of income tax contained in section 2 (E) of the revenue act of October 3, 1913, and sections 9 (a) and 14 (a) of Title I of the act of 1916, discloses a purpose on the part of Congress to permit the Commissioner, without limitation of time, to assess and collect whatever munitions taxes were determined to be due after notice and opportunity to the taxpayer to be heard. Had it been intended that the munitions tax be determined, assessed, and collected within a definite period of time after the close of the taxable period on December 31, of each year, or within a definite time after the filing of the return, which was required to be made on March 1 after the close of the preceding taxable year, limitation provisions similar to those inserted in the Revenue Act of 1913 and Title I of the act of 1916 relating to income taxes would, we think, have been included in section 305 or 306 of the munitions tax, Title III of the 1916 act. Section 305 of the munitions tax title instead of specifying the date on which the Commissioner should notify the taxpayer of the amount of tax found to be due upon the face of the return, provided merely that when such return had been transmitted to him by the collector the Commissioner should assess the tax disclosed to be due by the return and notify the person making such return of the amount of such tax *as soon as practicable* and that the taxpayer should pay such tax within thirty days from the date of such notice. The only possible limitation that could be read into this section would be one based upon an unreasonable delay by the Commissioner in assessing the tax disclosed on the return as made.

Opinion of the Court

Section 306 relates to the determination, assessment, and collection of tax in excess of that disclosed in the return, after an investigation and audit of the return and the books and records of the taxpayer. The language of this section clearly discloses the purpose to authorize the Commissioner to determine, assess, and collect such tax as he may determine to be due in excess of the tax disclosed upon the return, the pertinent language of the section being that "the Commissioner is authorized to make an investigation and to determine the amount of net profits and may assess the proper tax accordingly." There is clearly no limitation in this language as to the time within which he shall determine and assess any tax found to be due. The remainder of section 306 relates to notice to the taxpayer and the withholding of collection of the tax determined if the taxpayer files a written request for a hearing within thirty days after the date of such notice. Under the above-mentioned sections, 305 and 306, it seems clear that the munitions tax, whether disclosed on the return made under section 304 or by a final determination and assessment by the Commissioner, became due within the meaning of the subsequent general limitation statute enacted as section 1322 of the Revenue Act of 1921, when the Commissioner made a final determination with respect to the amount demanded and notified the taxpayer thereof. All of the taxes for 1916 were assessed and collected well within four years after determination and notice. In the case at bar the Commissioner made only one investigation of plaintiff's books and records and the three additional assessments, in November 1917, May 1924, and February 1925, were made during the time the case was under consideration in connection with plaintiff's protests, appeal, and request for a hearing. There is nothing in the statute that justifies the conclusion that the Commissioner may not make more than one determination and assessment or more than one investigation or audit of the return. Cf. *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539.

Plaintiff relies upon the case of *United States* v. *Anderson et al.*, 269 U. S. 422, 434, 443, in support of its contention that the munitions tax became due in 1917 and that the

amounts assessed in 1924 and 1925 were barred, but that decision, which involved a different question, is not applicable here. There the court had for consideration the question whether the munitions tax for 1916 was a proper accrued item so as to constitute a legal deduction from gross income for 1916 for income tax purposes; that was the only question before the court and was the only matter specifically decided. In the statement of the facts concerning the issue before it, the court set forth that the tax imposed on profits of munitions, manufactured by the appellee and sold during 1916, became due and was paid in 1917, but, at the same time, the court pointed out that the munitions tax return for 1916 was made in 1917 and that the tax as shown thereon after revision and an additional assessment was paid in 1917, the year it was due. The interpretation which we place upon Title III of the Revenue Act of 1916 is consistent with these statements of the court in the *Anderson case*. In that case the Commissioner during 1917 assessed the tax shown on the return. Thereafter, during the same year, he determined and assessed an additional tax. As a result the munitions tax so determined and assessed was paid in 1917. Obviously, therefore, such tax became due in 1917.

Early in the administration of the munitions tax title of the Revenue Act of 1916, the Commissioner held, II-2 C. B. 236, that under sections 305 and 306 the munitions tax became due upon determination, assessment, and notice, and this construction of the statute has been consistently followed. We think it is correct.

The last question relates to plaintiff's contention that the amount of $16,198.57 of the cost, less salvage, of properties acquired in 1915 and used in that and subsequent years in the manufacture of munitions, which amount the Commissioner allocated to the year 1915, should properly have been allocated to and allowed as deductions in determining munitions taxes for 1916 and 1917, for the reason that the allocation of any portion of the amortizable cost to 1915 gave a retroactive effect to the munitions tax act when none was intended. We think this contention of plaintiff cannot

be sustained on principle. In any event it cannot be sustained upon the evidence of record in this case. Section 302 (f) of the Revenue Act of 1916 provided that in computing net profits for the purpose of the munitions tax there should be allowed as deductions from gross amount received or accrued for the taxable year from the sale of munitions manufactured, among other things, "A reasonable allowance according to the conditions peculiar to each concern, for amortization of the values of buildings and machinery, account being taken of the exceptional depreciation of special plants." This section did not authorize an amortization deduction of the full costs of the buildings and machinery, but permitted a deduction only of a *reasonable allowance* in the taxable years on the basis of value. In arriving at a reasonable allowance to be made, the Commissioner was required by the statute to take into consideration the conditions peculiar to each concern and the exceptional depreciation of special plants. In the case at bar, plaintiff had acquired the greater portion of the facilities prior to 1916 upon which an allowance for amortization was claimed. Munition facilities costing $239,798.85 were acquired and used in 1915 and the balance of such facilities, costing $154,281.72, was acquired during 1916 and 1917. It is clear that the property used in the manufacture of munitions in 1915 suffered depreciation during that year and the evidence of record does not establish that the amount of $16,198.57 charged to 1915 by the Commissioner against the amortizable costs of $322,593.06 was not a reasonable allowance for depreciation of facilities acquired and used during that year. Nor does the evidence establish that the allowance by the Commissioner in 1916 of $119,453.62 for amortization in that year in respect of munitions facilities acquired in 1915 was unreasonably low. Plaintiff had the burden of showing that the amortization allowance, totaling $201,167.32, made by the Commissioner for 1916 was not reasonable. This it has failed to do.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WHALEY, *Judge*; WILLIAMS, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

# CON P. CURRAN PRINTING COMPANY v. THE UNITED STATES

[No. L-375. Decided May 4, 1936]

## *On the Proofs*

*Income and profits tax; special assessment; jurisdiction.*—The court is without jurisdiction to review the assessment and collection of taxes made under the special assessment provisions of sections 327 and 328 of the Revenue Act of 1918.

*Waiver of appeal to Board of Tax Appeals; right to sue; jurisdiction of court.*—A waiver by the taxpayer of right of appeal to the Board of Tax Appeals from the decision of the Commissioner of Internal Revenue was merely a unilateral waiver of a defense by the taxpayer, and notwithstanding the taxpayer's reservation in the waiver of any right it might have to suit in court, did not give a right to suit or confer jurisdiction upon the court where no such right or jurisdiction existed under the law.

*Jurisdiction; change of factors used in special assessment.*—In special assessment cases, a court cannot adopt the rate chosen by the Commissioner of Internal Revenue and apply it to a net income other than that which the Commissioner used in making his comparisons and arriving at the rate.

*The Reporter's* statement of the case:

*Mr. Leo H. Hoffman* for the plaintiff. *Mr. Robert W. Knox* and *Hoffman & Knox* were on the briefs.

*Mr. George H. Foster*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Missouri corporation with its principal office and place of business in St. Louis where it is engaged in the printing and binding business, specializing in printing forms commonly used by railroads, such as rate and tariff schedules, waybills, bills of lading, etc.

2. March 15, 1921, plaintiff filed its income and profits tax return for 1920 showing a net income of $333,279.25, and a tax liability of $77,284.72, which latter amount was paid in four equal installments of $19,321.18 on March 16, June 14, September 15, and December 15, 1921. Among the deductions taken by plaintiff on its return were the following:

Reporter's Statement of the Case

| | |
|---|---|
| Subscription to the endowment fund of St. Louis University (deducted as advertising) | $10,000.00 |
| Depreciation | 94,810.86 |
| Obsolescence—standing type and forms | 171,789.83 |

3. November 10, 1935, and September 23, 1926, plaintiff filed waivers which extended the period for assessment for 1920 to December 31, 1926, and December 31, 1927, respectively.

4. During 1925 an examination was made of plaintiff's return for 1920 by a revenue agent and an additional tax recommended of $145,905.88. Among the items which gave rise to the proposed additional tax were the disallowance of the subscription to the endowment fund of St. Louis University of $10,000, a reduction of the depreciation claimed from $94,810.86 to $26,322.20, and the disallowance of the deduction of $171,789.83 for obsolescence of standing type and forms. Invested capital was also reduced by $235,478.60, an amount set up on plaintiff's books in 1913 on the basis of the appraisal in 1910, representing labor costs entering into standing type and forms, as hereinafter more fully described.

5. December 10, 1925, plaintiff protested the proposed determination as set out in finding 4 on account of the various changes recommended by the revenue agent and in addition asked that its profits tax for 1920 be computed under the provisions of section 328 of the Revenue Act of 1918 because "'exceptional hardship' exists in the taxpayer's case as evidenced by the gross disproportion between the profits tax for 1920 of representative concerns as defined in section 328 and the profits tax of this taxpayer computed without the benefit of sections 327 and 328 * * *." The "exceptional hardship" was said to arise because of abnormal conditions affecting both income and invested capital. The request for special assessment was renewed on the same or similar grounds in plaintiff's protests of November 4, 1926, March 26, 1927, and June 1, 1927.

6. By a sixty-day letter dated September 19, 1927, the Commissioner of Internal Revenue advised plaintiff of the determination of a deficiency for 1920 of $126,082.34. In that determination the Commissioner disallowed the deduction claimed of $10,000 on account of the subscription

to the endowment fund of St. Louis University; $171,789.83, obsolescence of standing type and forms, and $38,344.96 of the depreciation claimed on the original return. In fixing plaintiff's invested capital in the same determination the Commissioner excluded the item of $235,478.60 heretofore referred to as representing the cost of standing type and forms. In that determination plaintiff's application for special assessment was denied.

Shortly after the receipt of the letter of September 19, 1927, plaintiff on September 23, 1927, made application to the special advisory committee of the Commissioner's office for further consideration of its case, and at that time requested that the following items be considered:

1. Reduction of invested capital in the amount of $235,478.60 on account of standing type and forms;
2. Disallowance of a deduction of $171,789.83 on account of obsolescence of standing type and forms;
3. Disallowance of a deduction of $12,097.55 for advertising, which included the subscription to St. Louis University of $10,000;
4. "The disallowance by the Department of the taxpayer's application for assessment under sections 327 and 328 of the Revenue Act of 1918 for the year 1920. The taxpayer's position on this phase is set forth in brief of March 26, 1927, and supplement thereto of June 1, 1927."

Thereafter the special advisory committee granted a conference to counsel for plaintiff and, after further consideration, a deficiency was determined for 1920 of $105,685.01. In connection with such determination plaintiff executed the following waiver of a right to file a petition with the U. S. Board of Tax Appeals, such waiver being dated November 8, 1927:

> The undersigned taxpayer hereby waives the right to file a petition with the U. S. Board of Tax Appeals under section 274 (a) of the Revenue Act of 1926 and consents to the assessment and collection of a deficiency in tax for the calendar year 1920 aggregating $105,685.01.
>
> This waiver is not intended to, and does not, admit the correctness of the tax liability claimed by the Government; it is not intended to, and does not, waive, or in any way change, the right of the taxpayer existent prior

to the signing of this waiver to a refund of the proposed assessment herein shown, or of any tax previously paid, provided claims for refund are filed within the period prescribed by the limitations of the statute properly applicable thereto; and it is not intended to, and does not, waive, or in any [way] change, the right of the taxpayer existent prior to the signing of this waiver to sue in court should said claims be disallowed, provided said suits are begun within the period prescribed by the limitations of the statute properly applicable thereto.

7. December 2, 1927, the special advisory committee advised plaintiff that the agreement reached in the conference referred to in finding 6 had been confirmed by the Commissioner and that the deficiency as set out in letter of September 19, 1927, had been revised to show a deficiency of $105,685.01. In such revision no change was made in net income but the profits tax was computed under section 328 instead of on a statutory basis. The letter to plaintiff read in part as follows:

> You are advised that after careful consideration and review, your application under the provisions of section 328 of the Revenue Act of 1918 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.
>
> The result of the audit under the above-mentioned provisions is as follows:

COMPUTATION OF TAX

| | | | |
|---|---|---|---|
| Profits tax under section 328 | | | $142,744.55 |
| Net income | | $546,996.33 | |
| Less: | | | |
| Profits tax | $142,744.55 | | |
| Exemption | 2,000.00 | | |
| | | 144,744.55 | |
| Subject to 10% tax | | 402,251.78 | |
| Tax at 10% | | | 40,225.18 |
| Correct tax liability | | | 182,969.73 |
| Tax assessed | | | 77,284.72 |
| Deficiency in tax | | | 105,685.01 |

8. The deficiency of $105,685.01 for 1920 referred to in the preceding finding was assessed on the Commissioner's December 1927 assessment list, and that amount, together with

interest, $11,305.40, was satisfied as follows: $112,990.13 paid January 26, 1928; $3,972.86 and $27.42 satisfied by a credit from an overpayment for 1919 on schedules dated January 5, 1928, and February 4, 1928, respectively.

**9.** March 31, 1928, plaintiff filed a claim for refund of $150,000 for 1920 and assigned various grounds therefor, among which were the disallowance of the deduction of $10,000 on account of the subscription to St. Louis University, reduction of depreciation in the amount of $68,488.66, disallowance of the item of $171,789.83 on account of obsolescence of standing type and forms, and the reduction of invested capital in the amount of $235,478.60 on account of the cost of standing type and forms. The claim also stated that "The Bureau erroneously denied claimant's application for special assessment under sections 327 and 328 of the Revenue Act of 1918", and urged that special assessment be allowed. The claim further urged that the additional assessment against plaintiff had been collected after the statutory period for collection had expired. The claim was rejected in full October 5, 1928.

**10.** November 13, 1929, plaintiff filed a further claim for refund for 1920 of $150,000 which assigned substantially the same bases as were set forth in the first claim. The Commissioner considered the second claim as a request for a reopening and reconsideration of the first claim, and on April 26, 1930, advised plaintiff that such request was denied.

**11.** February 14, 1931, which was subsequent to the date on which the petition was filed in this proceeding, plaintiff filed a further claim for the refund of $181,400.00 for 1920, assigning as a basis therefor the same grounds which had been set out in the prior claims except that the deduction for obsolescence of standing type and forms was increased from $171,789.83 to $370,135.47, and an addition to invested capital as determined by the Commissioner was claimed in the amount of $555,173.20 instead of $235,478.60 on account of standing type and forms.

**12.** Plaintiff began business about 1893 or 1894. Prior to 1902 or 1903 its type was set up from foundry type, and knocked down after a printing job therefrom, since it was too expensive to keep it standing. In 1902 or 1903 the mono-

type machine was introduced and its use was begun by plaintiff. After plaintiff began to use the monotype machine it also began to set up or build standing type and forms which were not immediately destroyed after a given job for which they were prepared, but they were stored and kept in order that they might be utilized in the event "repeat" orders were obtained for a like or similar job. As an aid to their location a proof was taken of the standing type and forms as they were prepared and a record made thereon of their location on the shelves or in their storage places. In that manner a proof book was compiled in which each proof was placed. As standing type and forms were destroyed proof sheets were removed from the proof book. The sheets in the proof book were used by plaintiff as a basis for determining the standing type and forms on hand, subject to an inventory check at irregular intervals. The standing type and forms as shown by the proof book also served as a basis for determining the amount of insurance to be carried thereon, which insurance was approximately $500,000 from about 1912 to 1916, and $1,000,000 in 1917 and 1918.

Plaintiff advertised the fact that it had standing type and forms on hand which had been prepared in connection with other jobs and that accordingly it could give a better price on another like or similar job and turn out the work more quickly than a concern which was not so advantageously situated.

Whether "repeat" orders would be obtained with respect to given forms could not be foretold and plaintiff generally followed the practice of keeping the standing type and forms as long as there remained a fair possibility of their subsequent use in another order. When the railroads, for example, which were plaintiff's principal customers, definitely discontinued a particular type of form which had previously been printed by plaintiff, plaintiff would destroy, that is, knock down, the standing type and forms from which it was printed, and that would likewise be done by plaintiff from time to time when it appeared that little or no probability existed for the future use of any standing type and forms which it had on hand. And again, one form might be superseded by another form, both of which were printed by plain-

tiff, in which event the old standing type and forms would be knocked down and new type and forms set up. In some instances, for example, in tariff schedules, a substantial part of the form from which the original schedules were printed could be used when minor changes were made in the schedules and that would be continued from time to time until it became expedient to print an entirely new schedule. In the foregoing manner standing type and forms were being set up from the inception of the use of the montoype machine in 1903 to beyond 1920, and at the same time old standing type and forms were being destroyed. The former, however, took place to a greater extent—at least until 1919—than the latter with the result that there was a gradual increase in the quantity of standing type and forms on hand. Standing type and forms suffer no appreciable depreciation through use and plaintiff has never set up depreciation thereon on its books or made a claim for a deduction from gross income in its income-tax returns on account thereof.

**13.** In 1910 plaintiff had an appraisal made of its standing type and forms, electrotypes, engravings, and other similar articles which showed quantities on hand and their cost of production as follows:

| | |
|---|---|
| 27,011 pages passenger and freight rate schedules from B1 to B1340 at $8.00 per sheet | $216, 088. 00 |
| 4,679 pages R. R. and commercial miscellaneous jobs from C-169 to C-4848 at $10 per sheet | 46, 790. 00 |
| 52,059 cardboard bottoms for pages | 491. 30 |
| 750,000 sq. ins. electrotypes at .03 | 22, 500. 00 |
| 70,000 sq. ins. zinc etchings (2,000 plates average 35 sq. ins. to plate) at .05 | 3, 500. 00 |
| 21,000 sq. ins. half-tones (1,000 plates average 21 sq. ins. to plate) at .15 | 3, 150. 00 |
| 1,095 pages 6-pt. foundry type on miscellaneous jobs | 4, 927. 50 |
| 1,000 boxes type sorts 6-8-10-12 pts | 2, 000. 00 |
| 500 packages type sorts 14-18-24-30 & 36 pts | 1, 250. 00 |
| 375 lbs. quads 12-18-24 & 36 pts | 112. 50 |
| 17 cases wood type 340 characters | 289. 00 |
| 917 railroad seals and commercial trade marks zinc and electros at .70 | 641. 90 |
| 500 copper engravings | 1, 000. 00 |

The cost set out above represented metal cost of $67,261.60, which had previously been capitalized and appeared on plaintiff's books, and labor cost of $235,478.60, which had previously been charged to expense and accordingly was not represented on plaintiff's books as an asset account. The labor costs did not include an additional

item of $78,816, the labor composition cost for the 750,000 square inches of electrotypes. That item was never entered on plaintiff's books either in connection with the appraisal or otherwise as a capital item, but it was charged to expense in the same manner as other labor costs. The standing type and forms set out in the appraisal were manufactured or set up from 1903 to 1910, inclusive, approximately seventy-five percent being manufactured from 1907 to 1910.

**14.** July 31, 1913, plaintiff made the following entry on its books:

| | | |
|---|---|---|
| Rate schedules—electros, and type & forms a/c | $302, 740. 20 | |
| To Electros a/c | | $9, 516. 35 |
| " Metal a/c | | 32, 724. 19 |
| " Type & Forms | | 25, 021. 06 |
| " Con P. Curran personal a/c | | 235, 478. 60 |

The board of directors in meeting assembled voted to open a new account on the books of the company to be known as "Rate Schedules—Electros & Type & Forms a/c" and ordered transferred by journal entry to the new a/c the amounts at this date charged to "electros a/c, metal a/c, and type & forms a/c", respectively, and also charge to this account and credit to the personal a/c of Mr. Con P. Curran the amount of difference between the total of these accounts as charged at this date ($67,261.60) to make the new account total the amount of appraisal as made by the American Appraisal Co., of Milwaukee, Wis., which total is $302,740.20, making amount to be credited to Mr. Con P. Curran a/c, $235,478.60 and that these entries when made in the journal be duly approved by the 2nd vice president and the secretary by affixing their signatures as officers of the company to entry made in journal.

A. S. HART, *Secretary.*

FLORANCE J. CURRAN,
*2d Vice President.*

At the time the foregoing entry was made the first three items appearing in such entry as credits appeared on plaintiff's books as asset items, representing the cost of the material for those items but not including any labor costs. After the posting of the journal entry the three old accounts were eliminated, and thereafter appeared in the asset account shown in finding 15. The last item, $235,478.60, represented the labor cost entering into the finished articles mentioned.

At the time the foregoing entry was made additional stock was issued to plaintiff's president on account of the credit balance thus set up in his account on plaintiff's books.

**15.** The following account entitled "Standing Type & Plates, Forms &c" appeared on plaintiff's books:

| 1913 | *Debits* | 1913 | *Credits* |
|---|---|---|---|
| July 31 To electros a/c | $9,516.35 | Dec. 31 By inventory | $302,740.20 |
| " " metal a/c | 32,724.19 | | |
| " " type & forms a/c | 25,021.06 | | |
| " " Con P. Curran | 235,478.60 | | |
| 1914 | | 1916 | |
| Jany. 1 To inventory | 302,740.20 | Dec. 30 by inventory | 352,409.44 |
| 1916 | | | |
| Dec. 30 " electros a/c for year 1916 | 7,858.94 | | |
| " " material a/c for year 1916 | 18,734.08 | | |
| Dec. 30 To loss & gain—increase in value | 23,076.22 | | |
| 1917 | | 1917 | |
| Jany. 1 To inventory | 352,409.44 | Dec. 31 By inventory | 390,517.54 |
| Dec. 31 " electros a/c for year 1917 | 4,195.15 | | |
| Dec. 31 To loss & gain—increase in value | 33,912.95 | | |
| 1918 | | 1918 | |
| Jany. 2 To inventory | 390,517.54 | Dec. 31 By inventory | 408,888.16 |
| Dec. 31 " material a/c—used during year | 18,370.62 | | |
| 1919 | | 1919 | |
| Jany. 1 To inventory | 408,888.16 | Dec. 31 L. & G. | 141,788.23 |
| Feby. 25 " Station List Pub. Co. | 823.82 | 31 Bal. to new ledger | 283,576.46 |
| 28 To S. I. Myerson Prtg. Co. | 15,652.71 | | |

(New ledger)

| 1920 | *Debits* | 1920 | *Credits* |
|---|---|---|---|
| Jan. 1 | $283,576.46 | Dec. 31 | $171,789.83 |
| Dec. 31 | 620.40 | Dec. 31 | 3,478.00 |
| | | " inventory | 85,188.64 |
| | | " | 23,740.39 |
| | 284,196.86 | | 284,196.86 |
| 1922 | | | |
| Jan. 3 Inventory | 85,188.64 | Dec. 30 | 36,091.92 |
| | | " | 49,096.72 |
| | 85,188.64 | | 85,188.64 |

The first three items in the above account, under date of July 31, 1913, were the ledger entries made for the purpose of setting up the amounts which were eliminated from these

accounts by the journal entry set out in finding 14. The last item under date of July 31, 1913, represented labor costs in connection with standing type and forms on hand when an appraisal was made in 1910. The entries in the account "To Inventory" and "By Inventory" did not mean that inventories were taken and entries made accordingly, but were merely notations made by the bookkeeper in closing the account at various intervals.

While the quantity of standing type and forms on hand, as well as the cost of labor entering therein, increased gradually from 1910 to December 31, 1919, no change was made in the account on account of the additional labor costs which were represented in the greater quantity of standing type and forms on hand.

**16.** Plaintiff followed the practice of charging the cost of metal, used in the preparation of its standing type and forms, to an asset account, on which no depreciation was taken, but the cost of composition (exclusive of "metal cost") was charged through its pay rolls to expense. The only variation from that practice occurred in connection with the journal entry referred to in finding 14.

There was little or no change in plaintiff's labor and material costs from 1910 to March 1, 1913, except for a slight increase, but the cost of both labor and material increased gradually after March 1, 1913, with the result that the cost of the standing type and forms on hand March 1, 1913, as well as at the beginning of 1917, 1918, 1919, and 1920, was in excess of that shown by the appraisal in 1910. There was also a gradual increase in the quantity of standing type and forms on hand from 1910 to the end of 1919, though, as shown in finding 15, plaintiff made no increase or change in the asset account because of the labor entering into its composition.

**17.** December 28, 1917, the Director General of the United States Railroad Administration took charge of the railroads of the United States under a proclamation of the President, and such control continued until March 1, 1920, when it was relinquished and the control of the railroads was turned back to their owners. The order relinquishing control was issued December 24, 1919. As heretofore stated a large part of

plaintiff's business came from the railroads and a substantial part of the standing type and forms which plaintiff had on hand had been used in printing various railroad forms.

In the beginning, forms, such as rate and tariff schedules and accounting forms which had been used by the railroads, were utilized by the Director General by placing a stamp thereon to indicate the change in control. Gradually, however, the Railroad Administration sought to standardize various forms which had been in use by the railroads, and as a result some of the forms previously used were superseded by other forms. Upon the return of the control of the railroads to their owners, some of the forms theretofore used by the Director General of the Railroads were no longer used.

**18.** At December 31, 1919, plaintiff made an examination of the standing type and forms on hand and found that, as a result of the events outlined in finding 17 and of other causes which occurred in the normal operations of its business, approximately one-third of its standing type and forms were obsolete. It accordingly made a charge to profit and loss and a credit to the asset account of standing type and forms of $141,788.23. At December 31, 1920, plaintiff determined that approximately 60 percent of its remaining standing type and forms were obsolete for a like reason and accordingly charged profit and loss and credited the standing type and forms account in the amount of $171,789.83. No change was made in the standing type and forms account because of metal in the standing type and forms which were determined to be obsolete, since the obsolete type and forms were knocked down and the metal used or held for use on future work. The record is insufficient to show when the standing type and forms which were determined in 1919 and 1920 to be obsolete were constructed and whether all or any part thereof represented standing type and forms included in the appraisal in 1910 and placed on the books as a capital item in 1913 or whether the obsolete items were those which had been constructed between 1910 and the date when they were determined to be obsolete and which had been currently charged to expense during that period.

Reporter's Statement of the Case

**19.** In the audit of plaintiff's return and claims for 1920 the Commissioner excluded from invested capital $235,478.60, the item which was set up on plaintiff's books in 1913 on the basis of an appraisal made in 1910 to record the labor costs which entered into the standing type and forms on hand in 1910, but which costs had previously been charged to expense. Similar costs from 1910 to 1920, inclusive, were likewise charged to expense. Plaintiff had on hand at January 1, 1920, a larger quantity of standing type and forms than in 1910 and 1913, the cost of which was in excess of that on hand in 1910 and 1913, but the record is insufficient to show when that on hand at January 1, 1920, was set up and whether any part of it was in existence in 1910 and 1913. The record is likewise insufficient to show when any of the standing type and forms on hand at January 1, 1920, was last used or its probable future use.

**20.** Plaintiff occupied a reinforced concrete factory building which had been constructed about 1910 and transferred to it about October 1, 1920. It was still being occupied and used by plaintiff at the time of the hearing in this proceeding April 1, 1932, though at the latter date it was not in every respect a modern building for printing business purposes.

The automobile trucks used in plaintiff's business had a normal useful life of approximately four years; composing room machinery, press room machinery, and binding room machinery had a normal useful life of approximately ten years. During 1920 plaintiff's business was very active and it was accordingly necessary to use much of its machinery and equipment twenty-four hours per day, that is, double the time during which a printing plant was ordinarily operated.

**21.** In its return for 1920 plaintiff made a claim for depreciation on buildings, machinery, and equipment as follows:

| | | | | |
|---|---|---|---|---|
| Automobile truck | | $4,821.90 | 25% | $1,205.47 |
| Furniture & fixtures: | | | | |
| Office | $18,550.53 | | | |
| Factory | 15,915.25 | | | |
| Warehouse | 2,711.59 | | | |
| Chicago office | 280.00 | | | |
| Washington office | 1,070.25 | | | |
| Toledo office | 157.75 | | | |
| New Orleans office | 681.55 | | | |
| | | 39,366.91 | 10% | 3,936.69 |

| | | | | |
|---|---|---|---|---|
| Machinery & equipment: | | | | |
| Composing room | $151, 867. 46 | | | |
| Press room | 146, 303. 07 | | | |
| Bindery | 76, 020. 42 | | | |
| | | $374, 190. 95 | 20% | $74, 838. 19 |
| Stock room | 2, 802. 48 | | | |
| General | 4, 835. 28 | | | |
| | | 7, 637. 76 | 10% | 763. 77 |
| Factory & office building | | 302, 224. 76 | 3% | 9, 066. 74 |
| Engine Room Mchy | | 25, 000. 00 | 20% | 5, 000. 00 |
| Total | | | | 94, 810. 86 |

**22.** In the examination of plaintiff's return by a revenue agent referred to in finding 4, the revenue agent recommended that the depreciation allowable for 1920 be reduced from $94,810.86 to $26,322.20, and also that invested capital be reduced at January 1, 1920, on account of alleged insufficient depreciation taken in prior years.

December 10, 1925, plaintiff protested the depreciation reduction as proposed by the revenue agent and submitted the following schedule as the amount allowable:

> The taxpayer deducted $94,810.86 as depreciation for the year 1920. The field agent allowed $26,322.20. The correct depreciation deduction for 1920 is $79,-171.40 determined as follows:

| Item | Value to be depreciated, average for year | Rate | Amount of depreciation |
|---|---|---|---|
| | | *Percent* | |
| A. Bindery machinery | $52, 638. 71 | 12 | $6, 316. 65 |
| B. Press room | 132, 650. 50 | 12 | 15, 918. 06 |
| C. Composing room stereotype machinery | 6, 408. 23 | 12 | 768. 99 |
| D. Composing room typesetting machinery | 97, 193. 87 | 20 | 19, 438. 77 |
| E. Stock room machinery | 2, 802. 48 | 12 | 336. 30 |
| F. General machinery and equipment | 4, 835. 28 | 12 | 580. 23 |
| G. Furniture and fixtures | 44, 012. 29 | 10 | 4, 401. 23 |
| H. Auto truck | 4, 810. 95 | 25 | 1, 202. 74 |
| I. Factory and office building | 281, 250. 00 | 8 | 22, 500. 00 |
| J. Engine room machinery | 12, 500. 00 | 20 | 2, 500. 00 |
| K. Additions and betterments (disallowed as expense in 1917) | 2, 084. 31 | 10 | 208. 43 |
| L. Leasehold (Mar. 1, 1913, value) | 210, 000. 00 | | 5, 000. 00 |
| Total | 851, 186. 62 | | 79, 171. 40 |

**23.** The Commissioner considered the protest referred to in finding 22, and, after various conferences and further

protest by plaintiff, allowed the amount of depreciation claimed in the schedule set out above except for the following items on which he made allowances as follows:

| | Amount claimed | Amount allowed |
|---|---|---|
| Factory and office building | $22,500 | $6,044.50 |
| Engine room machinery | 2,500 | 1,250.00 |
| Leasehold | 5,000 | 6,417.71 |

In computing the depreciation allowable on "Factory and office building" and "Engine room machinery" the Commissioner used rates of 2% and 5% instead of 8% and 20% since both assets were considered as having been owned by plaintiff for only three months during 1920.

The Commissioner rejected the recommendation of the revenue agent for a reduction of invested capital on account of depreciation which the revenue agent had computed in prior years but which had not been set up by plaintiff on its books.

The record is insufficient to show that the depreciation sustained by plaintiff for 1920 was greater than that allowed by the Commissioner as a deduction from gross income in 1920.

24. In 1920 plaintiff subscribed and paid $10,000 to an endowment fund for St. Louis University, a private institution supported by the Catholic Church. At that time plaintiff was obtaining certain printing business from St. Louis University and it made the subscription with the hope and expectation that it would not only aid it in retaining such business but also enable it to secure additional business from that institution and affiliated organizations. As an incident to such subscription plaintiff considered that the endowment fund was a worthy cause.

At that time St. Louis University's printing business amounted to approximately $100,000 annually, some of which was being done by plaintiff. Plaintiff obtained some business as a result of the subscription but not to the extent expected.

The amount of the subscription was deducted on plaintiff's return as advertising expense, but it was disallowed by

the Commissioner in the audit of plaintiff's returns as well as in the consideration of the claims for refund heretofore referred to.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff seeks to recover an alleged overassessment and overpayment of its income and excess profit taxes for the year 1920. One of the defenses made is that these taxes were levied and collected by a special assessment made by the Commissioner under sections 327 and 328 of the revenue act of 1918 and it is insisted that the courts are without jurisdiction to review his action.

Plaintiff made a return for the year 1920 and paid its tax accordingly. In 1925 an examination was made of plaintiff's return by a revenue agent and an additional tax recommended of $145,905.88. December 10, 1925, plaintiff protested against this determination and asked that the profits tax for 1920 be computed under the provisions of section 328 of the revenue act of 1918 because of "exceptional hardship" arising from abnormal conditions affecting both income and invested capital. In 1926 and in 1927 plaintiff renewed its request for a special assessment. September 19, 1927, the Commissioner advised plaintiff that a deficiency of $126,082.34 had been determined for 1920. Thereupon plaintiff applied to the special advisory committee of the Commissioner's office for further consideration of its case, which was granted and the deficiency was determined to be $105,685.01. With reference to this decision, on November 8, 1927, plaintiff filed a waiver of the right to file a petition with the Board of Tax Appeals and consented to the assessment and collection of a deficiency for the calendar year 1920 aggregating $105,685.01. This waiver, however, did not go very far as it was subject to limitations which will be hereinafter noted.

December 2, 1927, the advisory committee informed plaintiff that its application for special assessment under the provisions of section 328 of the revenue act of 1918 had

been allowed and that the result of the audit fixed the deficiency in tax at $105,685.01. This deficiency for 1920 was assessed in December 1927 and the amount with interest was paid by plaintiff.

March 31, 1928, plaintiff filed a claim for refund of $150,000 for 1920 assigning various grounds therefor and stated that the bureau had erroneously denied plaintiff's application for a special assessment. This claim for refund was rejected as was also a later claim for reopening and reconsideration thereof.

This court held in *Williamsport Wire Rope Co.* v. *United States*, 63 C. Cls. 463, that it had no jurisdiction to review the assessment and collection of taxes made under what are commonly known as the special assessment provisions. Upon review of this case by the Supreme Court (277 U. S. 551), the decision of this court was affirmed and the Supreme Court said with reference to sections 327 and 328 that—

> the nature of the task which it [Congress] confided to the Commissioner, the methods of procedure prescribed, and the language employed to express the conditions under which the special assessment is required, all negative the right to a review of his determination by a court.

It was held, however, that such decisions might be reviewed by the Board of Tax Appeals. This conclusion has been followed in so many decisions that it would seem as if the question raised by plaintiff had been set at rest. Plaintiff, however, contends that by reason of filing the waiver to which we have hereinabove referred, the courts acquired jurisdiction to review the Commissioner's determination; in other words, that the waiver somehow conferred jurisdiction upon this court to review the Commissioner's decision.

The waiver was not a contract but merely a "unilateral waiver of a defense by the taxpayer." *Stange* v. *United States*, 282 U. S. 270, 276. The plaintiff reserved in the waiver the right to sue but the acceptance of the waiver by the Commissioner did not bind the defendant to permit suit to be brought in a manner not provided for by the statutes. It will be seen from the findings that after the waiver was filed the Commissioner reversed his original decision not to

grant a special assessment and decided to make one. It would seem as if this left the whole matter in the same condition as if the waiver had not been filed except as to the limitation of time for making the assessment. But in any event, plaintiff could not create the right to sue where it did not exist by stating that his right was reserved; nor could it confer jurisdiction upon this court by a statement in the waiver, when under the statute the court had no authority to consider the case; nor was there any advantage taken of plaintiff, as counsel intimates. The waiver, in our opinion, had no effect in the way of conferring jurisdiction upon this or any other court to review the Commissioner's decision under a special assessment, and if the waiver did not confer upon the plaintiff the right to sue it is clear that the courts have no jurisdiction to try the case presented.

If we now undertook to determine the amount of the proper assessment against plaintiff necessarily we would have to review the action of the Commissioner and his computations made under the special assessment. As was said in *Cleveland Automobile Co.* v. *United States*, 70 Fed. (2d) 365, 368:

> * * * to hold the special assessment reviewable on questions of value and income would tend to defeat the very purpose for which sections 327 and 328 were enacted. If considerations affecting net income are to remain open to review, the very basis upon which alone special assessment can be granted and made becomes a shifting one, and the assessment an idle gesture, binding the government possibly, but never the taxpayer.

Plaintiff calls attention to the fact that it does not seek to change the rate of the tax as fixed by the Commissioner under the special assessment, and contends that as it does not seek to alter the rate it is not precluded from showing that the Commissioner made errors in his calculation of the amount of net income. Several cases are cited in support of this contention of plaintiff. With one exception, the facts were quite different and the courts did not have before them the question now involved. Some statements were made in *McKeever* v. *Eaton*, 6 Fed. Supp. 697, that may seem to

support this contention but they do not accord with the rule laid down by the Supreme Court which has been followed by this court. In the case of *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, 506, it was said that the allowance of a special assessment was a matter of administrative discretion and that—

> The Commissioner cannot make an administrative finding upon the question for decision under § 327 (d) or that under 328 until he has determined the net income of the taxpayer.

And further the court said:

> It is beyond the power of a court to usurp the Commissioner's function of finding that special assessment should be accorded, and equally so to substitute its discretion for his as to the factors to be used in computing the tax. The courts below were in error in adopting the rate chosen by the Commissioner and applying it to a net income other than that which he used in making his comparisons and arriving at the rate.

The plaintiff in this case is asking that the court reduce the amount of net income by making certain deductions the nature of which it is not necessary to set out. The net income is one of the "factors * * * used in computing the tax." We think the Supreme Court clearly laid down the rule that in special assessment cases a court can not adopt the rate chosen by the Commissioner and apply it "to a net income other than that which he used in making his comparisons and arriving at the rate." The precise question here presented was passed upon by this court in *Central Iron & Steel Co.* v. *United States*, 79 C. Cls. 56, 88 (certiorari denied). This was a case in which a special assessment had been granted and the plaintiff sought to have the net income revised and a new computation made thereon. This court said:

> When the taxpayer upon application obtains a determination of his tax under the special-assessment provisions he surrenders the right further to contest in court the correctness of the Commissioner's determination with respect to any of the factors necessary to his discretionary findings and the computation of the tax.

Also that it was—

> without jurisdiction to decide the question presented and remand the case to the Commissioner for further exercise of his discretionary powers to determine whether or not the change in net income results in a greater or less profits tax.

As this court is without power to consider any questions as to whether the Commissioner should have made further deductions in the net income of plaintiff, it follows that plaintiff's petition must be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

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## R. H. LONG COMPANY v. THE UNITED STATES

[No. M-425. Decided May 4, 1936]

*On the Proofs*

*Income and profits tax; compromise settlement negotiated by receiver in bankruptcy and approved by court.*—A compromise settlement of income and profits taxes due the Government negotiated by a receiver in bankruptcy and approved by the bankruptcy court is conclusive and cannot be collaterally attacked unless it appears that the court was without jurisdiction in the matter.

*Same; authority of bankruptcy court to approve and confirm compromise of claims; collateral attack on court's adjudication of claim.*—The approval by the bankruptcy court of the compromise of a claim of the Government against the bankrupt estate for additional taxes was an adjudication of the claim and can no more be attacked collaterally than can the adjudication of any other claim; and it is immaterial whether the negotiations leading up to the compromise were by the receiver in bankruptcy, prior to the adjudication of bankruptcy, or by the trustee in bankruptcy after such adjudication.

*The Reporter's* statement of the case:

*Mr. Brice Clagett* for the plaintiff. *Mr. Claude W. Dudley* was on the brief.

*Mr. George H. Foster*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

Reporter's Statement of the Case

The court made special findings of fact as follows:

1. Plaintiff is a Massachusetts corporation which was organized in 1917. It continued to exist as a corporation until about 1928 when it was dissolved, but in 1931 its corporate existence was revived by appropriate legislative action.

2. December 3, 1923, an involuntary petition in bankruptcy was filed against plaintiff in the United States District Court for the District of Massachusetts.

3. December 13, 1923, upon application of an intervening creditor, Guy Murchie, of Boston, Massachusetts, was appointed receiver with authority to take charge of plaintiff's assets and to carry on plaintiff's business until a trustee was appointed or until further order of that court.

4. August 16, 1924, Guy Murchie as "Receiver, R. H. Long Companies," wrote a letter to a representative of the Commissioner of Internal Revenue, which reads in part as follows:

> With regard to our understanding that I, as receiver of the R. H. Long Companies, would endeavor to raise $125,000 to pay the Government in settlement of all the Long tax matters to the date of the receivership, that is to December 1923, I have been at work with the creditors and with Mr. Long personally in order to get the cooperation of all the necessary parties to raise the money to make payment to the Government, and am glad to report that at last there seems to be a prospect for a definite agreement, upon the understanding that this payment will take care of all the taxes including any claims against Mr. R. H. Long personally.
>
> I assume this will be satisfactory to you because the claims against Mr. R. H. Long personally were claims which have already been adjusted. You may remember that our settlement was to the effect of preventing a large repayment to Mr. Long personally for 1918 tax overpaid and that beginning January 1, 1918, all Mr. Long's business was conducted by the R. H. Long Company and whatever profits were possibly made and due the Government were R. H. Long Company profits.
>
> If you can cooperate with me to the extent of letting our settlement cover everything, I can get Mr. Long's cooperation so that it will be possible for me to raise the money from the creditors and secure from Mr.

Long the surrender of the telegram bonds which I have a prospect of selling for enough money to enable the taxes to be paid in cash during September.

5. October 14, 1924, the said Guy Murchie, receiver, filed a petition with the said district court alleging that claim had been made against the alleged bankrupt (plaintiff) on account of income and profits taxes and excise taxes of plaintiff and R. H. Long Motors Company (a related corporation) as follows:

| | | |
|---|---|---|
| R. H. Long Motors Co. | $5, 456. 30 | Mfr. excise tax, Oct. 1923. |
| " " " " " | 272. 82 | 5% penalty. |
| " " " " " | 171. 87 | Int. to Feb. 29, 1924. |
| " " " " " | 4, 215. 50 | Mfr. excise tax, Nov. 1923. |
| " " " " " | 210. 78 | 5% penalty. |
| " " " " " | 88. 53 | Int. to Feb. 29, 1924. |
| R. H. Long Company | 465. 25 | Mfr. excise tax, Nov. 1923. |
| " " " " | 116. 31 | 25% penalty. |
| " " " " | 23. 26 | 5% penalty. |
| " " " " | 12. 10 | Int. to Feb. 29, 1924. |
| " " " " | 1, 112, 166. 00 | Additional 1918 income and profits tax. |
| " " " " | 204, 513. 00 | Additional 1919 income and profits tax. |
| " " " " | 31, 418. 00 | Additional 1920 income and profits tax. |
| " " " " | 62, 956. 31 | Additional 1921 income and profits tax. |
| | [1] 1, 422, 086. 03 | Total proof of claim. |

[1] Additional interest will accrue at the rate of 1% per month for each full month from February 29, 1924, to date of payment and from March 21, 1924, on income tax for 1918 to 1921, inclusive.

The petition further alleged that the receiver had had prolonged negotiations with the Bureau of Internal Revenue in regard to such tax liability and had been informed that an offer of $125,000 in compromise of the said tax liability would be accepted by the Commissioner of Internal Revenue; that it would be necessary to accompany such offer with a certified check for that amount; and that the receiver was informed and believed that in the event such an offer was accepted a discharge could be obtained of the claims enumerated above, not only for plaintiff, but also for R. H. Long Motors Company, which was likewise in receivership and against whom a similar claim had been made. The receiver accordingly asked:

1. That he may be authorized and instructed to compromise the claim of the United States for taxes for

the sum of one hundred and twenty-five thousand dollars ($125,000).

2. That he may be authorized and instructed to file with the Commissioner of Internal Revenue an offer of compromise for the sum of one hundred and twenty-five thousand dollars ($125,000) the claim of the United States against this estate for taxes and to accompany said offer with a certified check for the amount offered and that your petitioner be further authorized and instructed to prepare and file with the proper officials of the United States, such offer of compromise or other instruments as may be necessary in connection therewith.

**6.** January 12, 1925, an order was signed by Robert E. Goodwin, referee in bankruptcy, acting on the petition referred to in finding 5 as follows:

> The foregoing petition having been duly filed and having come on for hearing before me, after notice to creditors and after hearing the receiver in support thereof and no one objecting thereto and the alleged bankrupts having assented hereto, I find the facts are as above stated and that the action prayed for is required in the interest of the estate and it is therefore ordered:
>
> 1. That the receiver be and he hereby is authorized and instructed to compromise the claim of the United States for taxes against the alleged bankrupt estate by the payment of one hundred twenty-five thousand dollars ($125,000) and that the said receiver be and he hereby is authorized and instructed to file with the Commissioner of Internal Revenue an offer to compromise for the sum of one hundred twenty-five thousand dollars ($125,000) the claim of the United States against the R. H. Long Company for taxes upon the terms set forth in the foregoing petition; and that the receiver be and he hereby is authorized and instructed to accompany said offer with a certified check for the amount offered and to prepare and file with the proper officials of the United States such offer of compromise or other instruments as may be necessary in connection therewith.
>
> Witness the Honorable James A. Lowell, judge of the said court, and the seal thereof this 12th day of January 1925.

**7.** January 13, 1925, pursuant to the authority granted in the order referred to in finding 6, the said receiver submitted

to the Commissioner $125,000 as an offer in compromise on account of "R. H. Long Company, R. H. Long Motors Co., R. H. Long Shoe Co. (Massachusetts corporations), R. H. Long, personally", for additional taxes alleged to be due to and including December 19, 1923. The offer was signed "Guy Murchie, Receiver in Bankruptcy."

On the same day an amended offer in compromise was submitted by Guy Murchie, receiver, R. H. Long Companies", which differed from the original offer only in that "R. H. Long, personally", was omitted from the names of the parties on account of whom the offer was submitted, and the offer stated that it was on account of "additional income and excess-profits taxes due for the years 1917, 1918, 1919, 1920, 1921, 1922, and 1923 (to and including December 31, 1923)." The original and amended offers stated that—

> It is understood that this offer does not afford relief from the liability incurred unless and until it is actually accepted, and that the offer cannot be considered as having been accepted until the date on which formal notice of acceptance thereof is signed by the Commissioner.

A statement was attached to each offer which set out the negotiations which had been carried on between the receiver and representatives of the Commissioner looking to a settlement of the tax controversies involved and referring to the letter of August 16, 1924, set out in finding 4.

Upon submission of the above offers a receipt, dated January 14, 1925, was given to the receiver for the $125,000 which was described as a payment submitted on account of an "offer in compromise in lieu of additional taxes and interest for the years 1917 to 1923, inclusive."

8. Subsequent to the filing of the offers in compromise referred to in finding 7 and prior to September 28, 1925, the receiver filed a second petition in the district court in which the controversy referred to in the petition filed October 14, 1924, as set out in finding 5, was again referred to and a further statement made that the Commissioner of Internal Revenue had refused to accept such offer "unless furnished with a general release of any war claims so-called (i. e., claims against the Government arising under contracts, formal or informal, for war supplies) from this

alleged bankrupt, namely, the R. H. Long Company, and also a general release from Mr. Richard H. Long individually, of any claims he may have." The receiver further stated that in his opinion it was desirable that the tax claims should be disposed of as speedily as possible; that, if necessary, a release of the war claims should be given in order to facilitate the compromise, and that he had been informed that Mr. Richard H. Long was willing to give the release requested by the Commissioner of Internal Revenue. The receiver accordingly asked the court:

> 1. That he may be authorized and instructed to compromise the claims above set forth of the United States for taxes by the payment of such sum not to exceed one hundred and twenty-five thousand dollars ($125,000) as he may be able to negotiate, and by the giving of a release of all so-called war claims by him as receiver of the R. H. Long Company and by Richard H. Long, individually, if that is furnished to him by Mr. Long.
>
> 2. And your petitioner further prays that he may be authorized and instructed to file with the Commissioner of Internal Revenue at Washington, an offer of compromise on the basis hereinabove set forth, and to make such arrangements as to a deposit in connection therewith as may be required.

**9.** September 28, 1925, Robert E. Goodwin, referee in bankruptcy, issued the following order in connection with the petition referred to in finding 8:

> The foregoing petition having been duly filed and having come on for hearing before me, after notice to creditors and after hearing the receiver in support thereof and no one objecting thereto, I find the facts are as above stated and that the action prayed for is required in the interest of the estate and it is therefore ordered:
>
> 1. That the receiver be and he hereby is authorized and instructed to compromise the claim of the United States for taxes against the alleged bankrupt estate by the payment of such sum not to exceed one hundred twenty-five thousand dollars ($125,000) as he may be able to negotiate and by the giving of a general release of all so-called war claims by him as receiver of the R. H. Long Company and by Richard H. Long, individually, if that is furnished to him by Mr. Long.

And that the receiver be and he hereby is authorized and instructed to make such arrangements as to a deposit in connection therewith as may be required. And that the receiver or his attorneys be and they hereby are authorized to prepare and file with the proper officials of the United States such offer of settlement or other instruments as may be necessary in connection therewith.

**10.** October 17, 1925, R. H. Long Company, R. H. Long Motors Company, and R. H. Long Shoe Company executed the following

RELEASE OF ALL DEMANDS AGAINST THE UNITED STATES:

KNOW ALL MEN BY THESE PRESENTS:

That R. H. Long Company, R. H. Long Motors Company, and R. H. Long Shoe Company, all Massachusetts corporations, in consideration of the acceptance by the Treasury Department of the United States of an offer of one hundred twenty-five thousand dollars ($125,000) in compromise of the outstanding income-tax liabilities of the above-named corporations for the years 1917, 1918, 1919, 1920, 1921, 1922, and 1923, to and including December 31, 1923, said liabilities being represented by assessments greatly in excess of the amount of said offer and said offer having been submitted on or about January 14, 1925, by Guy Murchie, Esq., in his official capacity as receiver of the above corporations, do hereby severally release and forever discharge the United States of America and any Department or Bureau thereof from any and all actions, rights of action, claims, demands, and suits in law or in equity which the above-named corporations or either of them now have or hereafter may have against the United States of America for or by reason of any and all contracts or otherwise made by the above-named corporations or either of them with the War Department of the United States of America or any subdivision thereof in the years 1917, 1918, and 1919, or at any time before the date of this release.

On the same day Guy Murchie as receiver for the three companies mentioned in the foregoing release executed the following assent to the execution of such release:

KNOW ALL MEN BY THESE PRESENTS:

That I, GUY MURCHIE, receiver of the R. H. Long Company, R. H. Long Motors Company, and R. H. Long Shoe Company, and each of them, pursuant to the

authority and instructions to me given by order entered September 28, 1925, in the United States District Court for the District of Massachusetts, in certain proceedings in bankruptcy pending against said companies, and each of them, alleged bankrupts, hereby assent to the execution of the foregoing release from said companies, and each of them, to the United States of America.

Likewise on the same day meetings of the boards of directors of the three corporations were held at which Richard H. Long, treasurer, was authorized and directed to execute the release heretofore set out.

The several documents referred to in this finding were thereupon duly filed with the Commissioner of Internal Revenue, together with the order of the referee in bankruptcy dated September 28, 1925, and set out in finding 9, authorizing and instructing the receiver to compromise the claims in question.

**11.** November 10, 1925, plaintiff was adjudged bankrupt by the United States District Court for the District of Massachusetts. Thereafter Guy Murchie, heretofore referred to as receiver, was duly appointed trustee of the bankrupt and, after having furnished bond, he qualified December 8, 1925, to act in such capacity.

**12.** November 25, 1925, "Guy Murchie, receiver, R. H. Long Company", filed a petition in the aforementioned district court asking for approval of the order of the referee referred to in finding 9 and stating that such approval was requested after having received the following telegram from the Solicitor of Internal Revenue:

> Order of court approving authority of referee to compromise tax liability and release war claims by Long Companies deemed necessary. Action by court upon this detail before confirmation of composition appears to be discretionary and has been procured in other cases from other courts.

November 25, 1925, the approval and authority requested were granted by James A. Lowell, Judge of the United States District Court as follows:

> 1. That the order of Referee Robert E. Goodwin entered September 28, 1925, upon the petition of the receiver for leave to compromise claim of the United

States for additional income and other taxes, be and the same hereby is approved, ratified, and confirmed.

2. That the compromise negotiated by the Receiver with the Treasury Department of certain tax claims as set forth in the foregoing petition be and the same hereby is approved, ratified, and confirmed.

**13.** December 12, 1925, the Solicitor of Internal Revenue advised the said "Guy Murchie, receiver", as follows:

> The Commissioner of Internal Revenue has considered the proposition submitted by you on behalf of R. H. Long Co., R. H. Long Motors Co., and R. H. Long Shoe Co., bankrupt, on January 13, 1925, through the collector of internal revenue at Boston, Massachusetts, as a compromise of liabilities on account of unpaid additional income and excess-profits taxes for the years 1917 to 1923 (to and including December 31, 1923) in the sum of $1,008,649.10, with interest, and has decided, with the advice and consent of the Secretary of the Treasury, to close the case by the acceptance of the following terms: $125,000 in compromise of the above-named liability.

**14.** August 24, 1926, the composition offered by the bankrupt (plaintiff) to the United States District Court was confirmed and plaintiff was duly discharged by the said court.

**15.** On or about November 26, 1929, a claim for refund of $140,000 for the years 1917 to 1923, inclusive, was filed by R. H. Long Company, R. H. Long Motors Company, and R. H. Long Shoe Company, which assigned the following basis therefor:

> That none of the three above-named companies made any profit for any or all of the years from December 31, 1917, to December 31, 1923, but on the contrary suffered losses for each of the years named and finally each company was adjudicated a bankrupt. Accordingly, therefore, no income or excess profits or manufacturer's excise tax in any amount was due from any of the three above-named companies for any of the year or years in question.

The foregoing claim was rejected by the Commissioner on a schedule dated April 11, 1930.

Opinion of the Court

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, a Massachusetts Corporation, sues to recover $125,000, the amount paid to the United States government by the receiver in bankruptcy of the corporation in compromise of certain Federal income taxes.

The basis of the claim is that the receiver in bankruptcy was without legal authority to compromise claims against the bankrupt. It is contended that for that reason the compromise failed, and that the sum of $125,000 paid under its terms should be repaid to the plaintiff. The plaintiff in the brief says that the question presented is: "Did the receiver in bankruptcy of the R. H. Long Company, with the approval of the Bankruptcy Court, have power to compromise the claim of the Government against the R. H. Long Company for taxes?"

The facts, about which there is no dispute, disclose that one Guy Murchie was appointed by the United States District Court a receiver in bankruptcy for the plaintiff on December 13, 1923, with authority to take charge of the plaintiff's assets and carry on its business until a trustee in bankruptcy was appointed, or until further order of the court; that he continued to act as such until December 8, 1925, when he qualified as trustee, the plaintiff having been adjudged a bankrupt by the court; that while he was acting as receiver he filed a petition with the district court stating that a claim had been made by the United States against the plaintiff for additional taxes alleged to be due from it and its related company in a large amount, and asked the court for authority to negotiate a settlement with the Bureau of Internal Revenue for $125,000; the referee in bankruptcy acting on the receiver's petition, after due notice to creditors, and no one objecting thereto, found the facts as stated in the petition, and on January 12, 1925, entered an order authorizing and instructing the receiver to compromise the claim of the United States for taxes against the alleged bankrupt estate by the pay-

ment of a sum not to exceed $125,000; that the receiver thereafter made formal offer to the Bureau of Internal Revenue to pay the sum of $125,000 as a compromise of the government's tax claim against the plaintiff; that subsequently the receiver filed a second petition in the district court in which he stated that the Commissioner of Internal Revenue had refused to accept such offer "unless furnished with a general release of any war claims so-called (i. e., claims against the Government arising under contracts, formal or informal, for war supplies) from this alleged bankrupt, namely, the R. H. Long Company, and also a general release from Mr. Richard H. Long, individually, of any claims he may have"; that the referee in bankruptcy, upon consideration of the receiver's second petition, after due notice to creditors, and no one objecting thereto, on September 28, 1925, entered an order authorizing and instructing the receiver to compromise the claim of the United States for taxes against the alleged bankrupt estate by payment of a sum not to exceed $125,000 and by giving a general release of all so-called war claims by him as receiver of the R. H. Long Company and by Richard H. Long, individually, if such release be furnished to him by Mr. Long; that the receiver thereafter obtained the releases in question, which documents were duly filed by the receiver with the Commissioner of Internal Revenue, together with the order of the referee in bankruptcy, dated September 28, 1925; that on November 10, 1925, the plaintiff was adjudged a bankrupt by the court, and the receiver Murchie was duly appointed trustee of the bankrupt and qualified to act in that capacity on December 8, 1925; that the receiver filed his petition in the district court on November 25, 1925, asking for approval of the order of the referee of September 28, 1925, and that on the same day the court entered an order approving and ratifying the order of the referee: that the Solicitor of Internal Revenue on December 12, 1925, advised the said Murchie, formerly receiver, then trustee in bankruptcy, that the compromise offer had been accepted, and that on August 24, 1926, the said bankrupt was duly discharged by the court.

Opinion of the Court

The compromise in question having been approved by the bankruptcy court, is conclusive and can not be collaterally attacked unless it clearly appears the court was without jurisdiction in the matter. *Sabin* v. *Larkin-Green Logging Co.*, 218 Fed. 984; *Corbett* v. *Riddle*, 209 Fed. 811; *Huttig Manufacturing Co.* v. *Edwards*, 160 Fed. 619; *Edelstein* v. *United States*, 149 Fed. 636. The plaintiff concedes this, but contends that because receivers in bankruptcy are without authority to adjust or compromise claims against the bankrupt estate, the order of the court approving the compromise in this case was in excess of the jurisdiction of the court and consequently a nullity.

It does not follow that because receivers in bankruptcy are without authority to adjust or compromise claims against the alleged bankrupt estate prior to adjudication the court is without authority, after adjudication, to approve and confirm compromises that have been so made. The bankruptcy court under Title 11, Section 11 (2), U. S. Code, is vested with authority to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates." The plaintiff was adjudged a bankrupt prior to the entry of the order of the court on December 8, 1925, approving and confirming the order of the referee in bankruptcy authorizing the receiver to compromise the claim in question. The order of the court reads:

> 1. That the order of Referee Robert E. Goodwin entered September 28, 1925, upon the petition of the receiver for leave to compromise claim of the United States for additional income and other taxes, be and the same hereby is approved, ratified, and confirmed.
>
> 2. That the compromise negotiated by the Receiver with the Treasury Department of certain tax claims as set forth in the foregoing petition be and the same hereby is approved, ratified, and confirmed.

The act of the receiver in making the offer in compromise was not only approved by the court but the compromise itself was approved and confirmed. The approval of the compromise was an adjudication of the claim of the Government against the bankrupt estate for additional taxes, and

can no more be attacked collaterally than can the adjudication of any other claim. It is entirely immaterial that the negotiations leading up to the compromise were negotiated by the receiver prior to the adjudication of bankruptcy, rather than by the trustee in bankruptcy after the adjudication. The approval of the compromise settlement in question was clearly a matter within the jurisdiction of the court.

The plaintiff therefore can not recover, and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## MILTON J. LEVI, EXECUTOR, ESTATE OF HERMAN LEVI, v. THE UNITED STATES

[No. 41860. Decided May 4, 1936]

*On the Proofs*

*Estate-transfer tax; gift in contemplation of death.*—A gift to the doner's stepson, who was also his nephew, shortly before the donor's death from an unanticipated operation; and when the donor was apparently, and so far as he knew, in good health; and the making of which gift was induced by the fact of a bequest to the donor by his recently deceased wife, the mother of the nephew stepson, *held* not to have been a gift in contemplation of death, and therefore not taxable as such.

*Exemption of property subjected to prior taxation.*—Under the Revenue Act of 1926, the value of property of the estate of the plaintiff's decedent which had been subjected to estate tax as a part of the estate of his deceased wife, who had died within five years prior to his death, was not subject to estate tax.

*Same; renunciation or assignment of bequest.*—A gift by a surviving husband to his stepson, the son of his recently deceased wife, to compensate for a bequest to the husband by the wife, *held* not to be a renunciation or assignment of such bequest, to the stepson, and the value of the bequest therefore to be deductible from the gross estate of the husband, upon his decease, in the determination of estate tax, as having been subjected to estate tax as a part of the estate of a prior decedent.

*The Reporter's* statement of the case:

*Mr. Virgil Y. Moore* for the plaintiff. *Messrs. Smith, Moore & Lucas* were on the brief.

*Mr. Guy Patten*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

Plaintiff sues to recover $7,356.24 with interest, alleged overpayment of estate tax, on the ground that property of the value of $698,880 was erroneously and illegally included in the gross estate of Herman Levi as a transfer made in contemplation of death.

The executor contends that the property involved, although transferred within two years of decedent's death, was not made in contemplation of death. The defendant contends, first, that the transfer was testamentary in character and that the evidence does not overcome the determination of the Commissioner of Internal Revenue that the property was transferred in contemplation of death, and, second, that if not made in contemplation of death the transfer was intended by the decedent as a gift of the bequest made to him in the will of his wife and constituted, in substance, a taking of the bequest by purchase for full consideration paid in money or monies worth.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Herman Levi, the decedent, a resident of San Francisco, California, died testate in San Francisco May 11, 1928, at the age of 75 years. His death followed an operation decided upon in an effort to remove an "irregular annular deformity at the junction of the sigmoid and the rectum due to a carcinoma", which is the technical term denoting one form of cancer. Further reference will hereinafter be made to this operation and certain medical examinations previously made.

2. In and prior to 1910 and continuously thereafter until March 6, 1928, the date on which the gift hereinafter mentioned was made to Milton J. Levi, the decedent was the owner of 4,131⅓ shares of capital stock of H. Levi & Company. Milton J. Levi, Sr., a brother of the decedent, died

in 1910. At that time the entire stock of H. Levi & Company was owned one-third each by Milton J. Levi, Sr., his wife, Fannie Levi, and his brother Herman Levi, the decedent. Fannie Levi, the wife of Milton J. Levi, Sr., and the mother of Milton J. Levi who will be hereinafter mentioned and to whom the decedent made a gift of 4,000 shares of stock on March 6, 1928, had inherited one-third of the stock of H. Levi & Company from her father, Jacob Levi. Jacob Levi was a third cousin of Milton J. Levi, her husband, and of Herman Levi, the decedent. Prior to 1910 Fannie Levi had given 100 shares of her stock to her son Milton. In 1910, upon the death of Milton J. Levi, Sr., his wife, Fannie Levi, took by bequest his one-third of the stock of H. Levi & Company; thereupon Fannie Levi gave to her son Milton J. Levi, Jr., so much of said stock as was necessary to make Milton the owner of one-sixth of the 15,500 shares. This left Fannie Levi the owner of one-half and Herman Levi, the decedent, the owner of one-third of the stock of H. Levi & Company. Since 1911 Milton J. Levi, the son of Fannie Levi, had been the manager of H. Levi & Company and after that date Herman Levi, the decedent, became less active in the affairs of the company than had previously been the case. Under Milton's management the company prospered and its stock continued to increase in value until 1928, the controlling date in this case.

One of the subsidiaries of H. Levi & Company was the Progress Realty Company and during 1916 and 1917 Milton received a salary of $300 annually for his services to that subsidiary. He had received no salary for his services to H. Levi & Company; however, he received dividends on his stock in H. Levi & Company in the amounts of $500 in 1910, $5,600 in 1911, $5,833.33 in 1912, $7,466.67 in 1915, and $5,000 in 1916. Milton Levi owned all of the stock of a corporation known as Milton J. Levi Company, in exchange for which he had paid in the stock which he owned in H. Levi & Company, and during 1924 to 1928, inclusive, H. Levi & Company paid to Milton J. Levi Company dividends of $8,000 in 1924, $9,600 in 1925, $24,800 in 1927, and $17,750 in 1928. During the years 1923 to 1928, inclusive, H. Levi & Company

paid to Herman Levi, the decedent, a salary of $4,200 a year from 1923 to 1927, inclusive, and $1,750 in 1928.

3. Sometime prior to 1927 Herman Levi, the decedent, married Fannie Levi, the widow of his brother, Milton J. Levi, Sr., and thus the decedent, who was the uncle of Milton J. Levi, Jr., became, after his marriage to Fannie Levi, a step-father to Milton.

The decedent's wife, Fannie Levi, had been suffering from stomach trouble and on June 1, 1927, the decedent and his wife went on a trip to Europe, during which time the decedent planned to consult a European specialist as to her condition.

Prior and subsequent to June 1, 1927, and until April 16, 1928, the decedent, as far as he knew, was in perfect health. He had suffered from no illness of any consequence. During his absence in Europe Herman Levi was kept advised of the affairs of H. Levi & Company and early in 1928 was furnished with a trial balance of the corporation at December 31, 1927. This statement was furnished by Milton Levi who, in preparing it, had valued the real estate at its market value and the stocks and bonds at market value as shown by list prices. This statement disclosed the current value of the stock of H. Levi & Company as of December 31, 1927, to be $137.92 a share.

On February 11, 1928, while still in Europe, Mrs. Fannie Levi died. Her death greatly distressed her husband, Herman Levi. He returned with her remains to San Francisco and arrived there March 3. She was buried at San Francisco on Sunday, March 4, 1928. On the following day, March 5, Herman Levi, in going over the papers and securities of his wife taken from her safe-deposit box, located her will in a sealed envelope. Both Herman Levi, her husband, and Milton Levi, her son, had access to the safe-deposit box of Fannie Levi. Prior to March 5, 1928, neither Herman nor Milton knew the contents or had seen the will of Fannie Levi. During the forenoon of March 5 Herman Levi, while in the office of H. Levi & Company and in the presence of Milton Levi, opened and read the will of his wife and handed the open will to Milton, who read it. In this will Fannie Levi

bequeathed to her husband, Herman Levi, among other property, 2,583⅓ shares of stock of H. Levi & Company and $200,000 in cash. The stock bequeathed to Herman was an amount that made him and Milton equal owners of the stock of H. Levi & Company. On that date nothing further was said about the bequest of stock of H. Levi & Company made in the will of Fannie Levi to the decedent.

On the morning of March 6, 1928, while in the office of H. Levi & Company, Herman Levi stated to Milton that he felt that the will of his wife, Fannie Levi, had not treated him, Milton, fairly; that Fannie Levi had obtained all her possessions from either his (Milton's) father or his (Milton's) grandfather; that Milton had been in charge of the business for many years and had done most of the work in managing the affairs of the company. He also stated that he, the decedent, thought, because of these conditions, that Milton was entitled to the amount Fannie Levi had left him (Herman) by her will. At the same time Herman Levi further stated to Milton that he was giving him 4,000 shares of his (Herman's) stock in H. Levi & Company as that would equal the shares and cash which Fannie Levi had, by will, bequeathed to him (Herman). This gift was thereupon immediately completed on the morning of March 6 by the issuance of 4,000 shares to Milton Levi, as hereinafter stated. The amount of 1,416⅔ shares given to Milton by the decedent out of his private property in excess of the 2,583⅓ shares bequeathed to the decedent in the will of Fannie Levi had a value, as of December 31, 1927, of $195,386.67.

Immediately following the above-mentioned statements of the decedent to Milton Levi, Herman Levi stepped into the office of Ralph C. Feige, the secretary and treasurer of H. Levi & Company, also the confidential secretary of Herman Levi. The office of Feige adjoined that of Milton Levi. Herman Levi instructed the secretary to transfer 4,000 shares of stock of H. Levi & Company belonging to him to Milton. Upon giving these instructions the decedent mentioned to Feige the bequest in Fannie Levi's will, commented on Milton's activity in building up the business for many years,

and stated that both the business and Mrs. Fannie Levi's personal estate, as well as his own, had been greatly enhanced through Milton's efforts in managing the business. The decedent also told Feige of the stock and cash which had been bequeathed to him by his wife, Fannie Levi, and stated that the gift of 4,000 shares of his stock in H. Levi & Company which he was transferring to Milton was the fair and equitable thing for him to do. Thereupon the decedent brought his stock certificates in H. Levi & Company from his safe-deposit box in the bank and placed them in the office safe, telling Feige to transfer 4,000 shares out of these certificates to Milton. Thereupon Feige, as secretary and treasurer of the company, transferred 4,131⅓ stock certificates and then transferred back to Herman Levi 131⅓ shares, making the net transfer of 4,000 shares to Milton. The decedent in the presence of the secretary of the company endorsed his signature on the certificates and the secretary attached the proper revenue stamps and canceled the same. He then endorsed upon the face of each certificate "Canceled March 6, 1928, H. Levi & Company, per R. C. Feige." The secretary then issued a new certificate for 4,000 shares to Milton J. Levi, who took the certificate and on the same day placed it in his safe-deposit box. Since that time Milton Levi has been the owner of such stock, has voted the same, and received the dividends thereon.

Immediately prior to the making of this transfer the 15,000 shares, constituting the outstanding stock of H. Levi & Company, were issued and held as follows: Fannie Levi, 7,233⅓; Herman Levi, 5,164⅔; Milton J. Levi, 1; The Milton J. Levi Co., 3,099; Henri Levi, 1; R. C. Feige, 1.

4. At the time of the gift on March 6, 1928, as above mentioned, the decedent was about 75 years of age. He was 5 feet 9½ inches tall, and weighed 169 pounds. He was an active man for his age. His complexion was good and, as far as he knew, he was in perfect health. He had experienced no illness since 1900, except in the early part of 1927 when he was confined to a hospital for fifteen days recovering from an operation for hernia. His recovery from this was

complete. For many years prior to the transfer of the stock in question he had every appearance of enjoying good health. He occasionally made calls on his family physician concerning minor disturbances due to overeating. He was enjoying good health on March 6, 1928. He had a good appetite and had lost no weight, although he grieved much over the death of his wife. He did not and had not complained of any illness or internal pain, was in a normal state of mind, and seemed to be in a normal state of health for one of his age. For many years the decedent had resided at the Fairmont Hotel, San Francisco; Milton, then a bachelor, occupied an adjoining room. During the absence of the decedent in Europe and after his return he and Milton discussed the matter of removing from the Fairmont Hotel to an apartment. After the operation hereinafter mentioned was decided upon, further discussions regarding such removal were had and it was finally agreed that such move would not be made until after the decedent's return from the hospital.

5. About March 7, 1928, the decedent first complained of an itching around the navel on his abdomen. Shortly thereafter he went to see Dr. Jellinek, who had been his family physician and who also was an old personal friend; Milton accompanied him. The decedent told Dr. Jellinek of the rash on his abdomen, which the doctor observed around the navel. The itching spots had become irritated from scratching. Upon inquiry of the physician, the decedent stated that he had had no trouble from his intestinal tract and that he had not suffered from indigestion, although recently he had experienced some loss of sleep. His only complaint to Dr. Jellinek was in relation to the rash, that this bothered him only because of the itching. Dr. Jellinek made no examination of the decedent other than an inspection of the rash. He prescribed a mild non-irritating salve which the decedent used. Shortly following this visit to Dr. Jellinek the decedent mentioned to one of his close friends that he was using a salve to relieve the itching on his abdomen, but that the itching was nothing to become annoyed or excited about. After the decedent had used this salve for about a week or

more, he, for the first time, complained to Milton of slight pains in his abdomen and stated that he thought he would go again to see Dr. Jellinek. Milton suggested that, instead, he go to see Dr. Charles W. Cooper, who was regarded as one of the leading consultants in San Francisco. Thereafter, on April 6, 1928, the decedent went to see Dr. Cooper at his office. On this occasion Milton accompanied the decedent. Dr. Cooper examined the decedent at this time and made the following office record:

> Herman Levi, 75. Brought by son April 6, 1928. Is living at the Hotel Fairmont. Bothered by distress in region of the navel, with a cutting pain more acute within the last few weeks. Appetite is good. No particular distress after eating. Bowels are fairly regular with hot water. Has no cough. Wind is fairly good. Wife died in February in Cannes; since then he has not been sleeping very well. Blo. pr. 130–80–90. Sebaceous cyst, left shoulder. Teeth, upper and lower, O. K. Throat, tonsils, O. K. Heart, O. K. Lungs, O. K. Abdomen induration around umbilicus. Right inguinal hernia, markedly enlarged prostate. Reflexes, O. K. Liver and spleen, O. K.

This examination, as explained by Dr. Cooper in his testimony herein, disclosed the general physical condition of the decedent to be as follows: Appeared in good physical condition, in no sense a wasted individual; temperature, normal; urine, normal; bowel movement, normal; heart, normal; blood pressure, normal; enlarged prostate, such as might be expected in a man of his years; the "sebaceous cyst", commonly called wen, not serious; his vital capacity (a measure of his heart and lung capacity), registering 75%, unusually good for one of his age. The doctor found some moisture and redness with the rash around the navel.

**6.** Because of the hardened condition observed by Dr. Cooper around the navel, he advised the taking of X-ray photographs of the intestinal tract. This was done and on April 16, 1928, the X-ray report, together with photographs, was furnished Dr. Cooper and these disclosed an "irregular annular deformity at the junction of the sigmoid and the

rectum due to a carcinoma." On the same day Dr. Cooper informed the decedent that there was something in his intestinal tract that would cause obstruction and should be removed. He did not then or at any time thereafter inform the decedent that he was afflicted with cancer. The decedent received this information and advice without emotion which Dr. Cooper found was not unusual in such cases. Dr. Cooper informed decedent that he stood a very good chance of recovery from the operation, not only because of his otherwise good health but also because no obstructive symptoms had developed. During the interview with Dr. Cooper the decedent was neither definitely cheerful nor depressed.

7. Few cancers can be diagnosed early in their progress. A cancer may be well developed without disclosing any symptoms to the attention of the patient. The decedent probably had this cancer for some time before his first visit to Dr. Cooper. Cutting pains would not be associated in the mind of the patient with cancer. In the case of cancer, such as that with which the decedent was afflicted, there would be little or no pain unless accompanied by obstructive symptoms. The decedent had experienced no such symptoms. Pain comes not from the cancer but because the body fails to function due to an obstruction. The decedent did not mention any pain in his abdomen until some time subsequent to his call on Dr. Jellinek.

Following the decision of Dr. Cooper on April 16, 1928, that an operation should be performed on the decedent, the decedent thereafter, on April 20, 1928, made his last will and destroyed the prior one. On that date the decedent took his old will to the office of his attorney and had the attorney prepare a new will, which was executed about April 22. Milton accompanied the decedent on that occasion. In the discussion in connection with this new and last will no mention was made by the decedent of the gift of the 4,000 shares of H. Levi & Company's stock theretofore made to Milton nor the effect which such gift might have on his new will.

8. On April 26, 1928, Dr. Laurence Hoffman, in the presence of Dr. Cooper, operated on the decedent. They dis-

covered a growth which was much larger than had been anticipated. It was too large to be removed. It involved the intestinal organ affected in such a way as to make it impossible to pull this organ out for treatment. The operation consisted of making an opening above the growth, through which opening the contents might pass and thus relieve any subsequent obstruction. On May 11, 1928, the decedent died as a direct result of the operation.

**9.** On March 6, 1928, when the decedent made the gift to Milton of 4,000 shares of stock of H. Levi & Company which he had owned and held for many years prior thereto, the decedent was in good health, as far as he knew and as far as he had been informed by his physician. He had experienced no symptoms nor suffered any pain that would cause him to suspect that his health was bad. He did not anticipate death at a date earlier than the ordinary expectancy of one of his years. The decedent made the transfer on March 6, 1928, of 4,000 shares of stock of H. Levi & Company to Milton J. Levi as a gift because he felt it to be a moral obligation to place in the name and ownership of Milton the equivalent of the property which had come to him, the decedent, through no efforts of his own but which had been amassed largely by the efforts of Milton J. Levi, together with the efforts of the father and grandfather of Milton. The decedent did not make this gift in contemplation of or intended to take effect in possession or enjoyment at or after his death.

**10.** The 2,583⅓ shares of the capital stock of H. Levi & Company bequeathed by Fannie Levi to her husband, Herman Levi, and the $200,000 in cash were not distributed by the executor of her estate to Herman Levi during his lifetime. On December 4, 1929, the executor of the estate of Fannie Levi had the certificates of stock which had been bequeathed to Herman Levi canceled and new certificates therefor issued to Milton J. Levi & Company. In his last will the decedent, Herman Levi, left his entire estate, with the exception of specific cash legacies, to his nephew, Milton J. Levi.

**11.** May 9, 1929, Milton J. Levi as executor of the estate of Herman Levi, deceased, filed a Federal estate-tax return

in which he included (by reason of the conclusive presumption contained in section 302 (c) of the Revenue Act of 1926,[1]) the amount of $411,600 as representing the market value at the date of death of Herman Levi, less $5,000 statutory exemption, of the 4,000 shares of stock of H. Levi & Company which the deceased had transferred to said Milton as a gift on March 6, 1928. In this return there was also included other property of the decedent, about which there is no question in this case, of a value of $140,750.83. The executor also reported as a part of the gross estate of Herman Levi, the decedent, the 2,583⅓ shares of stock of H. Levi & Company and $200,000 in cash bequeathed to him in the will of Fannie Levi at the value of $469,062.17, which amount was deducted from the gross estate in determining the net estate subject to tax as "property identified as previously taxed" under section 303 (a) (2) of the Revenue Act of 1926 and was approved by the Commissioner. The return as thus made showed a net estate of $422,591.50 upon which, after proper credits, an estate tax of $2,745.92 was paid. In 1921 the Commissioner increased the value of the properties included in the gross estate, thereby determining a net estate of $822,171.26 and proposing a deficiency of $4,548.48. In this determination the Commissioner included the 4,000 shares of stock of H. Levi & Company which the decedent had transferred as a gift to Milton Levi on March 6, 1928, as having a market value of $698,880 as of the date of death of the decedent on May 11, 1928. The deficiency mentioned was assessed June 30, 1931, with interest of $537.59, which amounts were paid by the executor.

12. On July 2, 1931, the executor of the estate filed a claim for refund on the ground that the 4,000 shares of stock of H. Levi & Company of a value of $698,880, as determined by the Commissioner, were not a part of the gross estate for the reason that they had been given to Milton Levi by the decedent on March 6, 1928, and that such gift was not a transfer made in contemplation of or intended to take effect in possession or enjoyment at or after death. The claim

[1] The conclusive presumption provided in the statute was held unconstitutional. *Heiner* v. *Donnan et al.*, 285 U. S. 312.

also questioned the constitutionality of the provisions of section 302 (c) of the Revenue Act of 1926 which provided that a transfer of property by gift within two years of death should be conclusively presumed to have been transferred in contemplation of death. The Commissioner rejected this claim for refund and this suit was timely instituted.

An estate tax of $7,356.24 was paid as a result of the inclusion of the 4,000 shares of stock of H. Levi & Company at the value of $698,880. The amounts of $2,270.17 and $5,086.07 of such tax were paid May 11, 1929, and June 30, 1931, respectively.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

On March 6, 1928, the decedent transferred by gift a part of his estate to Milton J. Levi, his nephew and stepson, and on May 11, 1928, he died as a result of an operation for the purpose of removing an "irregular annular deformity at the junction of the sigmoid and the rectum due to a carcinoma." At the time of his death decedent was 75 years of age but on and prior to the date of transfer involved in this case, the details of which have been set forth in the findings, the decedent had not been ill, had not experienced any physical pain or in any way suffered from this condition. The decedent had for many years been in excellent health. He was an active, robust man of normal weight with all the appearance and symptoms of perfect health; he had lost no weight for many years prior to the date of the transfer nor prior to his death. Aside from an unimportant operation for hernia in 1927, from which his recovery was complete, the decedent had experienced no serious ailment for many years. On and prior to the date of the transfer in question neither the decedent nor his physician knew that he had cancer. Some time after the completion of the transfer that condition was discovered by a physical examination of the decedent by one of the leading physicians and consultants in San Francisco and the taking of X-ray photographs during the period April 6 to April 16, 1928. The report on the X-ray photographs disclosing the condition, due to carci-

noma, was made on the last-mentioned date and it was determined by the physician a day or two thereafter that an operation should be performed. This occurred on April 26, 1928, and the surgeons found a much more extensive growth than they had any reason to believe existed and further found that it could not be successfully removed. Accordingly, they made an opening above the growth in order to relieve any later obstruction. On May 11, 1928, decedent died, not from cancer but as a direct result of the operation. These facts are clearly established by the evidence and they show that the underlying and dominant motive for the transfer was other than contemplation of death.

We cannot concur in the second point, made for the first time in this suit, by counsel for the defendant that if the gift of the decedent to Milton J. Levi on March 6, 1928, was not a transfer in contemplation of death then the value of the 2,583⅓ shares of stock and the $200,000 in cash, a total deductible value under the defendant's computation of $616,588.33 (determined in accordance with the language of the statute), received by the decedent's estate from the estate of his deceased wife after his death should not be excluded from the gross estate of the decedent under Section 302 (a) (2), Revenue Act of 1926, as "forming a part of the gross estate of any person who died within five years prior to the death of the decedent." The section mentioned required that for the purpose of estate tax the value of the net estate of the decedent, Herman Levi, should be determined by deducting from the value of his gross estate an amount equal to the value of any property which formed a part of the gross estate of his wife, Fannie Levi, who had died within five years prior to his death.

In determining the net estate of the decedent, Herman Levi, the Commissioner of Internal Revenue deducted therefrom, as required by the statute, $616,588.33, representing an amount equal to the value of 2,583⅓ shares of stock of H. Levi & Company and $200,000 which came to the decedent under the will of his wife, Fannie Levi, which had formed a part of her gross estate and was subjected to tax. Counsel for the defendant now seeks to have the court ex-

Opinion of the Court

clude this statutory deduction from the gross estate of the decedent, Herman Levi, if it be held that the gift made by him March 6, 1928, was not a transfer in contemplation of death, and deny recovery of any portion of the tax collected on the theory that the gift on March 6, 1928, to Milton J. Levi by the decedent out of his own private property of 4,000 shares of the capital stock of H. Levi & Company of the value of $698,880 was a gift by Herman Levi of the bequest made to him in the will of his wife Fannie Levi and that the decedent, therefore, took the bequest from his wife by purchase for full consideration paid in money or monies worth. We fail to see how it could be held that the decedent purchased that which was already his. He made the gift of his own private property to Milton because of what he felt to be a moral obligation, but that did not alter the fact that the bequest by his wife came to the decedent solely under her will. The facts disclose that the estate of the decedent, Herman Levi, received after his death 2,583⅓ shares of stock of H. Levi & Company and $200,000 in cash from the estate of the decedent's wife, Fannie Levi, who had predeceased Herman three months. This property formed a part of her gross estate and was taxed as such. In accordance with the positive provisions of the statute, an amount equal to the value thereof was deducted from the gross estate of Herman Levi in computing the estate tax upon his estate. The stock of H. Levi & Company had a value, as finally determined by the Commissioner, of $174.72 a share. The value of the 4,000 shares given by the decedent to Milton Levi on March 6, 1928, was $698,880 and the value of the property bequeathed to the decedent by his wife, Fannie Levi, consisting of 2,583⅓ shares of stock and $200,000 in cash, amounted to $616,588.33, or a difference of $47,520. The clear purpose of section 303 (a) (2) of the Revenue Act of 1926 was to relieve from estate tax, upon the estate of a second decedent, the value of any property subjected to estate tax as a part of the gross estate of a person who had died within five years prior to the decedent from whose estate such property was directed to be excluded; for the purpose of this deduction it matters not whether the second decedent,

prior to his death, made a gift of much or little of his own private property. In such a case the gift, if not made in contemplation of death, cannot be subjected to tax merely because the person making it receives from another property which had been subjected to the estate tax, and dies within five years thereafter. In the circumstances we cannot exclude the deduction from the gross estate of the decedent. The 4,000 shares given to Milton Levi were delivered by the decedent March 6, 1928, and the bequest under the will of Fannie Levi was not received by the decedent's estate until December 4, 1929. Milton Levi owned in his own right the property given to him by the decedent on March 6, 1928, and from that date forward he drew dividends on the 4,000 shares of stock. The circumstances of the bequest in the will of Fannie Levi to the decedent may have moved him to make the gift of a portion of his own property to Milton; but there was otherwise no legal or actual connection between the bequest and the gift. The gift made by the decedent to Milton Levi on March 6, 1928, did not have the same effect in substance as a renunciation or an assignment of the bequest. And the amount of tax due by the estate of Herman Levi must be determined on the basis of what actually occurred rather than on what might have taken place. *United States* v. *Isham*, 17 Wall. 496; *Howbert* v. *Penrose*, 38 Fed. (2d) 577; *Commissioner* v. *Merchants' & Manufacturers' Fire Insurance Co.*, 72 Fed. (2d) 408; *Snyder* v. *Commissioner*, 73 Fed. (2d) 5; Appeal of *Anna M. Harkness*, 1 B. T. A. 127; *Mullins* v. *Commissioner*, 14 B. T. A. 426; *Minnie C. Brackett, Admrx.*, v. *Commissioner*, 19 B. T. A. 1154; and *Hoult* v. *Commissioner*, 24 B. T. A. 79. Had the decedent merely renunciated or assigned the bequest Milton Levi would never have received dividends on more than 2,583⅓ shares until the death of the decedent and he would not have received the dividends on these 2,583⅓ shares until the settlement of Fannie Levi's estate in 1929. When the decedent gave 4,000 shares to Milton Levi on March 6, 1928, Milton immediately became the absolute owner of these 4,000 shares of corporate stock, thereby vesting in him full control of H. Levi & Company,

including the right to vote salaries and dividends. Had there been only a renunciation or assignment of the bequest by the decedent, control of the corporation would have been equally divided between the decedent and Milton Levi, as was the design of Fannie Levi in making her will. In the circumstances we cannot exclude the deduction from the gross estate of the decedent of the amount of $616,588.33, representing the value of the property forming a part of the decedent's estate at the time the tax was determined and which had been previously taxed within five years as a part of the gross estate of his wife, and which deduction was directed to be made by section 303 of the Revenue Act of 1926.

Plaintiff is entitled to recover $7,356.24 with interest as provided by law, and judgment will be entered accordingly. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## THE PENNSYLVANIA RAILROAD CO. v. THE UNITED STATES

[No. 42311. Decided May 4, 1936]

*On the Proofs*

*Railroad transportation; freight classification and rates; airplanes and airplane parts.*—Plaintiff, as final carrier of Government shipments during 1927–1930 of airplanes and airplane parts, not boxed or crated, in fully loaded cars, held entitled to freight charges on the basis of the carload rate or the less-than-carload rate, whichever was lower, up to September 30, 1929, and on the basis of the carload rate thereafter.

*Note to freight classification; application and effect.*—A note to a freight classification published in specific connection with the published rating on specific articles of freight has no application other than to such articles, and therefore constitutes an exception to any general rule otherwise applicable.

*The Reporter's* statement of the case:

*Mr. R. Aubrey Bogley* for the plaintiff. *Messrs. McKenney, Flannery & Craighill* were on the brief.

*Mr. L. R. Mehlinger*, with whom was *Mr. Assistant Attorney General Angus D. MacLean*, for the defendant.

This suit was brought to recover $1,200.18, balance of freight charges alleged to be due on twenty-nine shipments of airplanes and airplane parts by the War and Navy Departments between various points in the United States during 1927 to 1930, inclusive.

The only question presented is the construction of certain provisions of the consolidated freight classifications as applied to the shipments involved, all of the essential facts having been stipulated.

It is agreed that all the shipments moved in cars fully loaded. As to shipments 1 to 25, inclusive, plaintiff contends that Rule 15 of the classifications requires that freight charges be assessed and collected at the carload rate or at less-than-carload rate for each shipment, whichever is cheaper; but that Rule 5 of the classifications provides the only means of ascertaining such less-than-carload rate, inasmuch as the airplanes and airplane parts were not boxed or crated and there were no less-than-carload classification ratings covering airplanes and airplane parts unboxed or uncrated, except as provided by Rule 5. With reference to shipments 26 to 29, inclusive, plaintiff contends that it is entitled to the carload rate on each shipment under Note 2 of the classifications then in effect, inasmuch as the articles were loaded in the cars by the shippers and were not enclosed in packages required for less-than-carload shipment

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a corporation, is engaged in interstate commerce as a common carrier of passengers and freight for hire.

During the years 1927, 1928, 1929, and 1930, plaintiff, in conjunction with other railway carriers, at the instance and

request of proper officers of the United States Army and Navy transported on Government bills-of-lading between various points in the United States numerous shipments of airplanes and airplane parts, property of the United States Government. Such shipments were delivered by plaintiff to and received by proper officers, agents, or representatives of the defendant. As the last carrier of the shipments, and the party entitled to be paid for the transportation charges thereon, plaintiff rendered to the disbursing officers of the United States Army and Navy, respectively, at Washington, its bills for transportation. The charges stated thereon, with the exception of the services under bills-of-lading WQ A 1565015/18, inclusive, were based in the first instance on the application to carload minimum weight of carload rates named in legally published tariffs on file with the Interstate Commerce Commission, while, as to the excepted services the plaintiff originally rendered its bills to the disbursing officers of the United States Army on the basis of the application to the actual weight of each shipment the less-than-carload rates likewise so named, and thereafter, either by supplementary bill rendered to the disbursing officer or by claim otherwise submitted to the General Accounting Office, requested payment on basis of carload minimum weight and carload rate. The disbursing officers of the Army and Navy Departments and the General Accounting Office refused to pay freight charges on the shipments based on carload rate and minimum carload weight, and deducted certain amounts in connection with each of the shipments, either from the original bills presented therefor or from subsequent bills submitted by plaintiff for other transportation service rendered to defendant. These deductions totaled $1,635.17. Such deductions were based upon the application of the less-than-carload rate to the actual weights of such shipments pursuant to certain tariff provisions legally published and filed with the Interstate Commerce Commission, which the disbursing officers and the General Accounting Office claimed to be applicable to establish the maximum charge on a fully loaded car.

2. The details of each of the twenty-nine shipments involved herein are correctly shown in Exhibit A to the peti-

tion, as follows: COLLECTION BILL NUMBER, BILL OF LADING NUMBER, LENGTH OF CAR ORDERED, LENGTH OF CAR FURNISHED, CAR INITIAL AND NUMBER, POINT OF ORIGIN, POINT OF DESTINATION, DATE OF SHIPMENT, GENERAL DESCRIPTION OF COMMODITY, ACTUAL WEIGHT OF SHIPMENT, CARLOAD MINIMUM WEIGHT, NET FREIGHT CHARGES RECEIVED, MANNER OF DEDUCTION (WHETHER FROM THE SAME BILL OR FROM A SUBSEQUENT BILL), AMOUNT DEDUCTED, AND DATE OF DEDUCTION.

3. The following provisions of the Consolidated Freight Classifications were legally published and filed with the Interstate Commerce Commission, and were in effect during the periods indicated:

Consolidated Freight Classification No. 4, Agent, F. W. Smith's I. C. C.—O. C. No. 48 (Agent, D. T. Lawrence, successor, April 30, 1927), Agent, R. C. Fyfe's I. C. C. No. 17, Agent, E. H. Dulaney's I. C. C. No. 19, effective from February 9, 1925, to December 15, 1927, and applicable on the dates of shipments involved in items 1 to 9, inclusive, in Exhibit A to the petition—

| | | Ratings | | |
|---|---|---|---|---|
| | | Official | Southern | Western |
| Page 53: Item 21 | Aeroplanes, Flying Boats or Hydroaeroplanes, see Notes 1 and 2: | | | |
| | With power installed, in boxes or crates, L. C. L. | D1 | D1 | D1 |
| | Without power, in boxes or crates, L. C. L. | 3tl | 3tl | 2½tl |
| | Loose or in packages, C. L., min. wt. 10,000 lbs., subject to Rule 34 | 1¼ | 1 | 1½ |
| Item 22 | Note 1.—Wing Panels or Wing Sections must be removed from fuselage or boat and knocked down. | | | |
| | Elevators, Landing Gear, Pontoons, Propellors, Rudder and Stabilizers must be detached. | | | |
| 23 | Note 2.—When loaded on open cars shipments must be completely boxed. | | | |
| Page 54: Item 2 | Wing Panels or Wing Sections, K. D., Cowls, Elevators, Rudders or Stabilizers, in boxes or crates, L. C. L. | D1 | D1 | D1 |
| 3 | Loose or in packages, C. L., min. wt. 10,000 lbs., subject to Rule 34 | 1¼ | 1 | 1½ |

Consolidated Freight Classification No. 5, Agent, D. T. Lawrence's I. C. C.—O. C. No. 49, Agent, R. C. Fyfe's I. C. C.

No. 18, Agent, E. H. Dulaney's I. C. C. No. 23, effective from December 14, 1927, to May 25, 1929, and applicable on the dates of shipments involved in items 10 to 24, inclusive, in Exhibit A to the petition—

| | | Official | Ratings Southern | Western |
|---|---|---|---|---|
| Page 55: | | | | |
| Item 2 | Aeroplanes, Flying Boats or Hydroaeroplanes, see Notes 1 and 2: | | | |
| | With power installed, in boxes or crates, L. C. L | D1 | D1 | D1 |
| | Without power, in boxes or crates, L. C. L | 3tl | 3tl | 2½tl |
| | Loose or in packages, C. L., min. wt. 10,000 lbs. subject to Rule 34 | 1¼ | 1 | 1½ |
| 3 | Note 1.—Wing Panels or Wing Sections must be removed from fuselage or boat and knocked down. Elevators, Landing Gear, Pontoons, Propellers, Rudders and Stabilizers must be detached. | | | |
| Page 55: | | | | |
| Item 4 | Note 2.—When loaded on open cars shipments must be completely boxed. | | | |
| Item 5 | Aeroplane, Flying Boat or Hydroaeroplane Parts: | | | |
| 7 | Fuselage: | | | |
| | With power installed, in boxes or crates, L. C. L | D1 | D1 | D1 |
| | Without power, in boxes or crates, L. C. L | 2½tl | 2½tl | 2½tl |
| 9 | Wing panels or Wing Sections, K D., Cowls, Elevators, Rudders, or Stabilizers, in boxes or crates, L. C. L. | D1 | D1 | D1 |
| 10 | Loose or in packages, C. L., min. wt. 10,000 lbs. subject to Rule 34 | 1¼ | 1 | 1½ |
| 12 | Aeroplane, Flying Boat or Hydroaeroplane Parts, N. O. I. B. N.: | | | |
| 13 | Cloth and wood combined or cloth, wood and iron or steel combined, in boxes or crates | D1 | D1 | D1 |
| 14 | Iron, steel, or wooden, in boxes or crates | 2 | 1 | 1 |
| 15 | Metal and wood combined, in boxes or crates | 1 | 1 | 1 |
| 16 | Metal other than iron or steel, in boxes or crates | 1 | 1 | 1 |
| Page 481: | | | | |
| Item 12 | Wire: | | | |
| 16 | Iron or steel: | | | |
| 17 | Acid coppered, galvanized, painted, plain or tinned, N. O. I. B. N., including Barbed Wire, see Note: | | | |
| | In barrels, boxes, bundles, or coils, or on reels, L. C. L | 4 | 4 | 4 |

Effective May 25, 1929, supplement No. 25 to Consolidated Freight Classification No. 5 canceled items 2 to 16, inclusive, as shown on page 55 thereof and in lieu pub-

lished items as follows, applicable on date of service involved in item 25 in Exhibit A to the petition—

| | | Ratings Official | Southern | Western |
|---|---|---|---|---|
| Page 12: | | | | |
| Item 15 | Airplanes or Airplane Parts, see Notes 1 and 2. | | | |
| 16 | Airplanes, with power, taken apart, in boxes or crates, L. C. L | D1 | D1 | D1 |
| 18 | Fuselage, without power in boxes or crates, L. C. L | 2½tl | 2½tl | 2½tl |
| 19 | Fuselage, with power installed, in boxes or crates, L. C. L | D1 | D1 | D1 |
| Page 13: | | | | |
| Item 4 | Wings, Wing Panels or Sections, Cowls, Elevators, Rudders or Stabilizers, in boxes or crates, L. C. L | D1 | D1 | D1 |
| 5 | Airplane Parts, N. O. I. B. N. | | | |
| 6 | Cloth and wood combined, or cloth, wood and metal combined, in boxes or crates, L. C. L | D1 | D1 | D1 |
| 7 | Metal or wood, or metal and wood combined, in boxes or crates, L. C. L | 1½ | 1½ | 1½ |
| 8 | Airplanes and Parts in boxes or crates, or securely racked and braced in cars, C. L. min. wt. 10,000 lbs., subject to Rule 34 | 1¼ | 1¼ | 1½ |
| 9 | Note 1.—When loaded on open cars shipments must be completely boxed. | | | |

Effective from September 30, 1929, to June 15, 1930, supplement No. 33 to Consolidated Freight Classification No. 5, published items as follows, applicable on dates of services involved in items 26 to 29, inclusive, in Exhibit A to petition—

| | | Ratings Official | Southern | Western |
|---|---|---|---|---|
| Page 26: | | | | |
| Item 10 | Airplanes or Airplane parts, see Notes 1 and 2. | | | |
| 12 | Airplanes or parts, in boxes or crates or securely racked and braced in cars, C. L., min. wt. 10,000 lbs., subject to Rule 34 | 1¼ | 1¼ | 1½ |
| 14 | Note 2.—Articles loaded in cars by shippers not enclosed in packages required for less than carload shipment, will be charged for as a carload shipment. | | | |

Likewise effective from September 30, 1929, to June 15, 1930, items as follows were published in supplement No. 25 to Consolidated Freight Classification No. 5 and were appli-

Reporter's Statement of the Case

cable on the dates of services involved in items 26 to 29, inclusive, in Exhibit A to petition—

| | | Official | Ratings Southern | Western |
|---|---|---|---|---|
| Page 12: Item 15 | Airplanes or Airplane Parts, see Notes 1 and 2. | | | |
| 16 | Airplanes, with power, taken apart, in boxes or crates, L. C. L. | D1 | D1 | D1 |
| Page 13: Item 4 | Wings, Wing Panels or Sections, Cowls, Elevators, Rudders or Stabilizers, in boxes or crates, L. C. L. | D1 | D1 | D1 |

Effective from December 18, 1925, to June 15, 1930, and applicable on the dates of services involved in all of items 1 to 29, inclusive, in Exhibit A to petition—the Consolidated Freight Classification No. 4 (supplement No. 24), and the Consolidated Freight Classification No. 5 published a rule, as follows:

> Rule 5, Section 3 (d). When articles have been accepted and come into the carriers' possession to be transported and are in containers of a kind, or a shipping form of a kind, which is not specifically provided in the description for such articles, the rating on the articles in such unauthorized container or shipping form will be based on the ratings on the same articles in such other containers or shipping forms that have been authorized for such articles, as follows, but this rule must not be used as a basis for quoting rates in advance of shipment:
>
> | As shipped | Ratings of the same Article to Apply |
> |---|---|
> | * * * | * * * |
> | Articles, loose. | Three classes higher than in barrels or boxes, whichever is higher * * *. |

And effective from February 9, 1925, to June 15, 1930, and applicable on the dates of services involved in all of items 1 to 29, inclusive, in Exhibit A to petition—the Consolidated

Freight Classification No. 4 and the Consolidated Freight Classification No. 5 published a rule in pertinent part as follows:

> Rule 15, Section 1. * * * the charge for a less-than-carload shipment must not exceed the charge for a minimum carload of the same freight at the carload rate; the charge for a car fully loaded must not exceed the charge for the same lot of freight if taken as a less-than-carload shipment.

4. If each of the shipments was chargeable at carload rate and minimum carload weight, plaintiff is entitled to recover $1,637.98; if to each shipment involved herein there should be applied that basis, namely, (1) the applicable carload minimum weight and carload rate or (2) actual weight and less-than-carload rate, including the penalty under rule 5 of the Classification, quoted above, where applicable, which results in the lower charge on a given shipment, the plaintiff is entitled to recover $1,004.28. But if the lower of these two bases should be applied only in connection with each of items 1 to 25, inclusive, listed in Exhibit A to the petition, and the applicable carload minimum weight and carload rate should be applied as the basis for the charge on each of items 26 to 29, inclusive, listed therein (the last four items relating to service during the period when item 14 (Note 2), page 26, of supplement 33 to Consolidated Freight Classification No. 5, above quoted, was in effect), the plaintiff is entitled to recover $1,200.18.

5. All of the cars involved herein were fully loaded within the meaning of Rule 15 of the Consolidated Freight Classifications, above quoted. None of the shipments was packed in boxes or crates as provided in the less-than-carload classification provisions above quoted, except certain portions of some of the shipments on which no additional amount is claimed as for penalty under Rule 5. During the period involved herein there were no less-than-carload classification ratings in effect covering airplanes or airplane parts unboxed or uncrated, except as provided by Rule 5 of the classifications, above quoted.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

During the years 1927 to 1930, inclusive, plaintiff, as delivering carrier, transported for the defendant numerous airplanes and airplane parts; for this service and the service of its connections, it claims certain underpayments. The question of the amount of underpayment, if any, involves a construction of the carriers' published tariffs.

The facts (Finding 5) show that during the period involved herein there were no less-than-carload classification ratings in effect covering airplanes or airplane parts unboxed or uncrated, except as provided by Rule 5 of the classifications which provides as follows:

> Rule 5, Section 3 (d).—When articles have been accepted and come into the carriers' possession to be transported and are in * * * a shipping form of a kind, which is not specifically provided in the description for such articles, the rating on the articles in such * * * shipping form will be based on the ratings on the same articles in such other * * * shipping forms that have been authorized for such articles, as follows: Articles, loose. Three classes higher than in * * * boxes * * *.

The term "loose" as used above includes articles racked and braced in the car, as in the instant case, Section 6 (c) of Rule 5 providing that "When provision is made for the acceptance of articles 'loose,' the shipper is not relieved of responsibility for properly blocking and stowing such articles as are loaded by the shipper."

The facts further show that none of the shipments was packed in boxes or crates as provided in the less-than-carload classification provisions of Rule 5 quoted in Finding 3, except certain portions of some of the shipments on which no additional amount is claimed by plaintiff as for penalty.

It should be noted at the outset that the classification provisions set out in Finding 3, which are all of the pertinent classification provisions having a bearing upon the issue here involved, disclose that while carload rates are prescribed for

Opinion of the Court

airplanes and airplane parts "in boxes or crates, or securely racked and braced", all less-than-carload rates carry only the description "in boxes or crates."

In the following tabulation there are listed the twenty-nine shipments and opposite each is shown the freight charge based on the carload and the less-than-carload rate, respectively, under Rule 5, the figures in italics being the lesser of the two charges. The last two columns of the tabulation show, first, the amount paid by the defendant and, second, the amount claimed by plaintiff as the difference between the amount paid and the lesser of the two amounts shown in columns 1 and 2 (except for the last four items which were shipped after September 30, 1929, the effective date of Note 2, Supplement #33, to Consolidated Freight Classifications #5, as to which the difference is stated between the amount paid and the carload charge).

| Items | Charges on C. L. basis | Charges on L. C. L. basis under Rule 5 | Amount paid | Amount due |
|---|---|---|---|---|
| 1 | *$99.00* | $104.20 | $72.96 | $26.04 |
| 2 | *99.00* | 104.20 | 72.96 | 26.04 |
| 3 | *99.00* | 104.20 | 72.92 | 26.08 |
| 4 | *99.00* | 104.20 | 72.92 | 26.08 |
| 5 | 110.88 | *49.77* | 28.44 | 21.33 |
| 6 | 92.96 | *51.26* | 29.26 | 22.00 |
| 7 | 75.04 | *55.74* | 42.05 | 13.69 |
| 8 | 96.88 | *46.26* | 26.41 | 19.85 |
| 9 | *278.96* | 348.71 | 232.43 | 46.53 |
| 10 | 154.00 | *79.20* | 52.80 | 26.40 |
| 11 | 92.96 | *56.76* | 32.40 | 24.36 |
| 12 | *160.38* | 210.14 | 120.08 | 40.30 |
| 13 | 83.00 | *57.31* | 32.72 | 24.59 |
| 14 | 71.68 | *40.27* | 23.18 | 17.09 |
| 15 | *148.96* | 241.73 | 117.15 | 31.81 |
| 16 | *148.96* | 272.49 | 132.06 | 16.90 |
| 17 | *148.96* | 259.31 | 125.67 | 23.29 |
| 18 | *148.96* | 281.28 | 136.32 | 12.64 |
| 19 | *148.96* | 184.59 | 89.46 | 59.50 |
| 20 | *148.96* | 241.73 | 117.15 | 31.81 |
| 21 | *148.96* | 250.52 | 121.41 | 27.55 |
| 22 | *148.96* | 241.73 | 117.15 | 31.81 |
| 23 | *148.96* | 188.99 | 91.59 | 57.37 |
| 24 | 151.89 | *73.79* | 59.37 | 14.42 |
| 52 | 63.50 | *44.63* | 25.50 | 19.13 |
| 26 Moved under Note 2 | 83.00 | *40.17* | 40.17 | 42.83 |
| 27 Moved under Note 2 | 260.96 | *176.14* | 176.14 | 84.82 |
| 28 Moved under Note 2 | 693.20 | *624.95* | 374.49 | 318.71 |
| 29 Moved under Note 2 | *693.20* | 741.43 | 625.99 | 67.21 |
| | 4,899.13 | 5,275.90 | 3,261.15 | 1,200.18 |

All of the shipments were in cars fully loaded within tariff definitions. With reference to the items sued on, none of the shipments was packed in boxes or crates. Con-

sidered in less-than-carload lots, the lack of such containers entitled the carrier to three times the rates otherwise applicable.

All of the shipments were loaded by the defendant and were tendered on Government bills-of-lading. Four of the shipments, items 26 to 29, inclusive, are controlled by Note 2, item 14, page 26, of Supplement No. 33 to Consolidated Freight Classification No. 5 (Finding 3), which provides that articles loaded in cars by shippers not enclosed in packages required for less-than-carload shipment, will be charged for as a carload shipment. These articles were not so enclosed and it was plain that carload classification, rate, and weight apply without alternative. Note No. 2 was published in specific connection with the published rating on airplanes and airplane parts. It has no other application and, therefore, constitutes an exception to any general rule otherwise applicable.

The remaining shipments, items 1 to 25, inclusive, are all governed by Rule 15, Section 1, either of Consolidated Freight Classification No. 4 or No. 5, the pertinent portion of which provides "* * * the charge for a less-than-carload shipment must not exceed the charge for a minimum carload of the same freight at the carload rate; the charge for a car fully loaded must not exceed the charge for the same lot of freight if taken as a less-than-carload shipment." Inasmuch as all cars were fully loaded, the *prima facie* carload classification, rate, and weight must be applied, but not to "exceed the charge for the same lot of freight *if taken as a less-than-carload shipment.*"

The less-than-carload charges for some of these shipments, items 1 to 25, inclusive, based on their unpacked condition, would be in excess of the carload classification, rate, and weight, and cannot, therefore, be applied. The less-than-carload charges for others based on an assumed condition of proper packing, that is packing requisite for less-than-carload shipment, would be less than that of carload classification, rate, and weight. But we find no tariff authority for assuming a physical condition which did not exist. If such an assumption were made, there would be need for a further assumption that the containers would

weigh nothing. Adequate boxes or crates for airplanes or airplane parts would clearly add considerable to the gross weight.

The defendant relies upon the application of Rule 15 and contends that Rule 5 should not be considered, because the articles upon which Rule 5 applies a penalty rate for failure to comply with the less-than-carload packing requirements were racked and braced. With this we cannot agree. Rule 15 provides that the *charge* for a car fully loaded must not exceed the *charge* for the same lot of freight *if taken* as a less-than-carload shipment. "Charge," as here used, can only mean the lawful tariff charge stated in the classifications for the freight as tendered for transportation. The less-than-carload *charge* can only be found in Rule 5 of the classifications. The phrase "if taken as a less-than-carload shipment" found in Rule 15 is important. We must give the words of Rule 15 their ordinary meaning, and this compels the conclusion that the only charge that could be assessed and collected for the freight here involved, "if taken", that is, if it had been received or accepted as less-than-carload shipments in the condition offered and taken, is the charge provided by Rule 5. The fact is, and the parties have stipulated, that during the period involved herein there were no less-than-carload classification ratings in effect covering airplanes or airplane parts unboxed or uncrated, except as provided by Rule 5 of the classifications. In these circumstances the freight charges on each of the shipments 1 to 25 inclusive must be assessed on the basis of the carload rate, except when the charges are found to be lower when computed on the basis of the less-than-carload rate as provided by Rule 5, in which event the latter charge must be assessed. Plaintiff is also entitled to freight charges on shipments 26 to 29 inclusive based upon the carload rate, as provided in Note 2 hereinbefore referred to.

For the foregoing reasons the plaintiff, on the facts in this case, is entitled to recover one thousand two hundred dollars and eighteen cents ($1,200.18) for which judgment will be entered. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

# WALTER HUNTER, EXECUTOR OF THE WILL OF CHARLES W. HUNTER, v. THE UNITED STATES

[No. 42418. Decided May 4, 1936]

*On the Proofs*

*Estate tax; transfer in contemplation of death.*—A determination by the Commissioner of Internal Revenue that a transfer of the decedent's property by him was in contemplation of death must stand unless overcome by proof that the dominant motive for making the transfer was other than contemplation of death.

*Same.*—The transfer of decedent's property by him a short time before his death held to have been in contemplation of death, and the plaintiff therefore not entitled to recover the estate tax paid on such transfer.

*The Reporter's* statement of the case:

*Mr. Clarence W. Clifton* for the plaintiff. *Randolph & Clifton* were on the brief.

*Mr. J. H. Sheppard*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

Plaintiff seeks to recover $10,475.44 with interest, estate tax alleged to have been erroneously and illegally collected. This tax resulted from the inclusion by the Commissioner in the gross estate of the decedent of property of the value of $514,608.80 which the Commissioner held had been transferred July 9, 1928, by the decedent to his children in contemplation of death. The property in question consisted of 4,650 shares of corporate stock which constituted almost the entire property and estate owned by the decedent.

Plaintiff contends that this property was not transferred by the decedent in contemplation of death.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is the duly qualified and acting executor of the estate of Charles W. Hunter who died testate in Memphis, Tennessee, January 8, 1929, at the age of 85 years. The decedent was a citizen of the United States and a resi-

dent of Memphis, Tennessee. The will of the decedent was not immediately filed for probate since his property had theretofore been transferred to his children, as will hereinafter appear, but upon a suit being filed by the State of Tennessee against the decedent's estate the will was admitted to probate November 21, 1930, and letters testamentary were duly issued to plaintiff on the same day. Decedent left a wife and the following children: Edward T. Hunter, Manuel J. Hunter, Chatham Hunter, C. Walter Hunter, Frank Hunter, Louise H. Coates, Florence H. Myers, Elizabeth H. Polk, and Marie H. Glover.

2. After the decedent's death an estate-tax return was prepared on behalf of his estate by an auditor of the C. W. Hunter Company (hereinafter described) and signed by Chatham Hunter, a son of the decedent, who was president of the aforementioned corporation. At that time no executor had qualified. The return was filed December 18, 1929, and no property, either real or personal, was shown therein as owned by the decedent at his death. Under the schedule providing for information as to transfers of property without adequate and full consideration therefor in money or money's worth, the return showed that such a transfer had been made and gave the following information in connection therewith:

"All of the capital stock and bonds of C. W. Hunter Company—about July 1928—to carry out an often expressed desire and an intention he had long had of providing for his children all of whom were grown. Nominal value $1.00."

The debts of the decedent were shown at a nominal value of one dollar, and accordingly no taxable net estate was shown.

Subsequently an examination of the return was made by a revenue agent, and as a result the Commissioner determined a deficiency of $10,292.50. After waiver by plaintiff of his right to appeal to the United States Board of Tax Appeals, the deficiency was duly assessed and was paid by plaintiff July 27, 1931, together with interest of $84.60. The deficiency resulted from the determination by the Commissioner that the transfers referred to in the return had been made in contemplation of death and the following explanation was given by the Commissioner of his action:

The value of the following described property transferred by the decedent on or about July 9, 1928, to his wife and seven of his children in contemplation of death is included in the gross estate in accordance with the provisions of section 302 (c) of the Revenue Act of 1926:

| | |
|---|---|
| 2,850 shares, Charles W. Hunter Corporation, preferred | $285,000.00 |
| 1,800 shares, Charles W. Hunter Corporation, common | 229,608.80 |

August 6, 1931, plaintiff was advised of a further deficiency of $89.34, which was assessed and paid October 5, 1931, together with interest of $9. In determining the further deficiency the Commissioner made certain minor adjustments, but adhered to his original position with respect to the aforementioned transfers of property, and gave the following explanation of his action:

> Inasmuch as the representatives of the estate do not admit that these transfers were made in contemplation of death and for the purpose of arriving at an expeditious closing of the estate, a $5,000 exemption for each of the seven beneficiaries is deducted. In the event that any appeal from this finding is made, however, the allowance of these exemptions should not be construed as in any manner estopping the Bureau from showing (1) That no valid transfers were in fact made. (2) That if valid transfers were made, such transfers were made in actual contemplation of death.

**3.** July 26, 1932, plaintiff filed a claim for the refund of the tax paid on the ground that the decedent left no taxable estate; that no property passed under his will, and that he had not made any gifts, transfers, or distributions in contemplation of death. February 21, 1933, the Commissioner rejected the claim for refund on the ground that the transfers referred to in connection with the audit of the return were made in contemplation of death, and thereafter this suit was timely instituted.

**4.** The decedent was born in Canada but came to the United States at an early age and had resided in Memphis, Tennessee, for approximately 60 years at the time of his death at that place. He came from a long-lived Canadian family of people of strong health and vitality, and was him-

self of a strong and rugged constitution. At least two of his relatives lived beyond the age of ninety and one was teaching Sunday school after she had passed that age.

Decedent was what might be termed a self-made and self-educated man, starting with nothing and finally accumulating the substantial property involved in this proceeding. Shortly after coming to Memphis he became engaged in furnishing willows, largely under Government contracts, for revetment work along the Mississippi River. His work began in a small way and expanded until it comprised operations over an area of some 500 miles from the Gulf of Mexico up the Mississippi River. In this work the decedent at times employed as many as eight or nine hundred men and had sawmills, quarter boats, barges, and other equipment which he used in preparing and conveying the willows to the required point of destination. In carrying on such operations the decedent led a very active outdoor life, it being necessary not only to locate and acquire sources of supply of material but also to supervise the cutting and transportation of the material. During the earlier years most of the outdoor work, as well as the general supervision of the operations, was carried on by the decedent and that continued until about 1925 or 1926 except that as his older sons grew up they became associated with him in the business in various ways. Walter Hunter, the oldest child and plaintiff in this proceeding, began working in his father's business when he was about 16 or 17 years of age and continued to work for him for some 15 or 20 years up to about 1909 or 1910. This son was never placed in charge of the business, though the decedent had much confidence in him and often consulted him in regard to various transactions relating to the business.

About 1909 or 1910 Walter left his father and went into the tire and rubber business for himself. For this purpose the decedent advanced him between $65,000 and $70,000. In the operation of his business, Walter borrowed approximately $40,000, which was guaranteed by the decedent, and when the creditor insisted upon payment the amount was paid by the decedent. Some of the amounts advanced to Walter by the decedent were charged to him on the de-

cedent's books and some were not. There was no agreement between them that such amounts would be taken into consideration in determining Walter's share upon the final distribution of the decedent's estate.

After severing his connection with his father's business, Walter Hunter was still consulted by his father about the latter's business, such as purchase of lands and bids to be submitted under proposed contracts. For at least ten years prior to the decedent's death, the decedent had urged this son from time to time to come back into the business with him, stating that he wanted to turn the business over to his sons.

About 1913 Edward Hunter, decedent's second son, became actively associated with his father in the latter's business. He gradually took charge of the outside work on the river and by 1925 was in charge of that work. He continued in that capacity until the decedent's death. After this son took charge of the field work the decedent did not go out on the river frequently. Between 1925 and 1928 he was out on the river only occasionally. Frank Hunter also worked with his father though he was not as active as Walter and Edward, and prior to 1925 had left the decedent and become engaged in business in Florida. The decedent made advances to Frank for the aforementioned purpose. Similarly, Manuel Hunter worked for his father both in the field and in the office. The four aforementioned sons never received a college education. The youngest son, Chatham Hunter, was graduated from Yale in 1925 and in January 1926 returned to Memphis, where he became actively connected with his father's business, as will hereinafter appear.

5. In the contracting operations in which he was engaged the decedent leased or purchased various tracts of land along the Mississippi River for the purpose of cutting and removing the willows therefrom for use in filling his contracts for revetment work. The boundary lines of these lands were often very indefinite and uncertain and accordingly the possibility existed of cutting trees (willows) on land other than that purchased or leased by him in connection with the decedent's operations. The State of Mississippi had a statute which provided a penalty of $5 a tree

for the unauthorized cutting of a tree on the land of another party. Between October 2, 1924, and August 20, 1925, five suits were filed alleging that the decedent had violated this statute. The decedent had previously incurred the enmity of the parties bringing suits because of a suit arising out of a contract which the decedent had filed against these parties.

The first suit against the decedent was filed October 2, 1924, and the amount claimed was $265,000. Since the decedent was a nonresident of Mississippi, land owned by him in Mississippi was attached on or shortly after the suit was brought. Upon trial of the case it was won by the decedent. Upon appeal by plaintiffs the judgment of the trial court was affirmed and the case remanded to the trial court, where a final decree of dismissal was entered December 1, 1926.

A second suit was filed October 9, 1924, claiming $170,000, and a third suit July 1, 1925, claiming $250,000. These two suits were compromised for the total sum of $3,500, the decree of compromise disposing of the suit being entered December 20, 1927.

The fourth suit was filed July 14, 1925, claiming $277,175. It was later tried, and a decree entered in favor of plaintiff for $573.36. Upon appeal the decree was reversed, and finally the case was compromised for $800. The final decree was entered May 29, 1928.

The fifth suit was filed August 20, 1925, in which the amount claimed was $394,795. It was finally dismissed December 21, 1926.

The foregoing suits gave the decedent much concern because of the potential liability to his entire estate, both in Tennessee and Mississippi. The decedent accordingly considered it necessary to employ counsel both from Memphis, Tennessee, and from Mississippi to protect his interests and to pay substantial fees in connection with this litigation.

**6.** June 9, 1925, the decedent executed a common-law trust which had been under consideration since the latter part of 1923 or the early part of 1924. Under the terms of the trust instrument the decedent transferred substantially all of his property to two trustees known and designated as the "C. W. Hunter Company", the trustees being the decedent and his

oldest son, Walter Hunter. Provision was made therein for the substitution of trustees in the event of death or disability of either of the named trustees, and also for the increase in the number of trustees not in excess of ten. The indenture further provided that the trustees should issue to each of the decedent's children who subscribed thereto a certificate of beneficial interest in the trust estate. Ten such certificates were to be issued, each to represent a one-tenth undivided interest in the estate. The trust was to continue for a period not to exceed twenty years, and during that period the trustees were given broad powers to engage in business, but at the expiration of the twenty-year period the trustees were to liquidate the assets and distribute the cash received therefrom to the holders of the certificates of beneficial interest. The trust was recorded July 22, 1925, in Shelby County, Tennessee, but at that time only five of the decedent's children had affixed their signatures thereto, the other four being out of the city at the time. The issuance of the certificates of beneficial interest, as provided by the trust agreement, would have resulted in equal participation by each of the decedent's children in the trust estate.

7. However, the common-law trust agreement referred to in finding 6 was never carried out for reasons which will hereinafter appear. In August 1925 one of the decedent's daughters, Mrs. Louise H. Coates, who had not signed the agreement and who had been away from Memphis, returned home. She had been aware that the agreement was being prepared but she had not seen it until it was presented to her for signature, at which time it had already been signed by five of the children and had been recorded. The other children were also aware of the preparation of the trust agreement, but no objection had previously been made thereto.

Upon examination of the instrument Mrs. Coates was not satisfied that it provided a fair distribution of the decedent's property among his children in view of the fact that substantial advances had already been made to two of the sons, Walter and Frank. She was also interested in seeing the youngest son, Chatham Hunter, who had recently been graduated from college, become active in the business,

and she felt that a suitable opportunity for such participation was not provided by the trust agreement. She accordingly consulted Mr. Wassell Randolph, an attorney, as to questions which had arisen in her mind as to the agreement, and discussed it with her father and other members of the family. Many conferences were held with Randolph which were participated in at times by various members of the family, including Mrs. Coates, Mrs. Glover, Mrs. Myers, Mrs. Polk, Chatham Hunter, Edward Hunter, and the decedent. In addition, the terms of the trust agreement and a proper distribution of the property were discussed on many occasions by the children and decedent.

At the conferences with Randolph, in discussing the purpose of the execution of the common-law trust and, later, a substitute therefor, the decedent stated that he was getting along in years (he then being 82 or 83 years of age), that he was tired of handling his business, and that he desired to retire and have his children or some of his sons take over the management of the business while he could give them appropriate instructions and observe how they carried on the business. He also expressed his desire to effectuate an equitable division of his property in his lifetime among his children by taking into consideration advances previously made to some of them. He also referred to the suits which had been instituted and were about to be instituted in Mississippi and his desire to protect his estate from any possible adverse decisions therein. In all of the discussions, both with Randolph and among the children, the decedent evidenced little interest in how the property was divided so long as the children were satisfied, his paramount concern being that arrangement be made for a division that would cause all the children to be satisfied. At that time the decedent was able to express himself intelligently to Randolph and to make known his wishes and the reasons for the distribution of his property among his children. The decedent did not mention death in any of his discussions with Randolph.

8. As a result of advice given by Randolph and the conferences among the children, such consideration extending from August 1925 to February 1926, the decedent decided to

cancel the common-law trust, and instructed Randolph to take the necessary action to effect its complete revocation. Accordingly, in February 1926, quitclaim deeds were prepared and thereafter executed by the five children who had signed the trust agreement through which the property which had been conveyed by the decedent and his wife was reconveyed to the latter.

**9.** In January 1926, Chatham Hunter, the youngest son, returned to Memphis from Florida, where he had been engaged in the real estate business since his graduation from Yale, and became associated with his father. At the beginning Chatham received a salary of $150 a month. He began work in the office and gradually took over the administrative end of the business. At that time Edward Hunter was in charge of the field work, as appears in finding 4.

The decedent, however, continued to be active in the business after Chatham returned in January 1926, and his relinquishment of his former activities took place as Chatham was able to assume them. At first he directed Chatham in the performance of various duties, instructed him in carrying on the business and in general directed the affairs of the business. In 1926 or 1927 the decedent gave Chatham a power of attorney through which the latter was permitted to sign checks and notes, and otherwise take over the supervision of the financial end of the business, though during the period from 1926 to 1928 decedent negotiated loans at the bank and otherwise participated in the financial end of the business, both in an active and advisory capacity.

As a result of the duties assumed by Edward Hunter in connection with the field work and Chatham Hunter in the administrative and office end of the business, the decedent was performing few, if any, active duties at the time the decedent's assets were transferred to the C. W. Hunter Company in April 1928, and the stock was transferred to his children in July 1928 as heretofore shown.

**10.** At the time of the revocation of the common-law trust as well as prior thereto, the litigation referred to in finding 5 was giving the decedent much concern. At or about that time Randolph advised the decedent that, in view of the potential liability involved, he should discontinue taking the

willow contracts in his own name. Acting upon that advice a Tennessee corporation was formed about March 1926 under the name of the Valley Contracting Company, and thereafter the willow contracts were taken in the name of that corporation. The river equipment necessary to carry out such contracts was retained by the decedent and leased to the corporation. The corporation had a capital stock of $5,000 which was issued to the decedent for $5,000 in cash. After the organization of the C. W. Hunter Company, as set out in finding 12, the stock of the Valley Contracting Company was sold by the decedent to the C. W. Hunter Company for $25,000, which amount was credited to the decedent's account on the books of the latter company.

**11.** After the common-law trust had been revoked, as set out in finding 8, further conferences and discussions were had by the decedent with Randolph and a firm of accountants which audited his books as to some other method of carrying out the purposes which he had sought to accomplish by the execution of the trust. These discussions were had from time to time during the period from the early part of 1926 until 1928, when the transaction which gave rise to this suit was consummated. In 1928 the decedent stated to the aforementioned Randolph that he was even more anxious then than in 1925 to be relieved of his business, to have his property divided among the children and to have them carry on the business since he was that much older and was getting older every day.

**12.** As a result of the discussions the decedent caused a Delaware corporation to be organized in January 1928, known as "C. W. Hunter Company", and on April 1, 1928, transferred to it practically all his assets, real and personal, receiving therefor the entire issue of capital stock, both common and preferred (preferred stock, $285,000, and common stock, $180,000). The decedent retained an automobile and a life estate in the place where he lived. Part of the property transferred consisted of two tracts of land on which the corporation issued bearer bonds and delivered them to the decedent.

The directorate of the corporation was comprised of the decedent's nine children. Chatham Hunter, the youngest

son, was elected president and treasurer, and Mrs. Louise H. Coates, a daughter, was elected vice president and secretary. The decedent was not an officer, director, or employee of the company. Thereafter personal obligations incurred by the decedent were paid by the company's check and charged to the decedent's account. The checks were signed by Chatham Hunter as president of the company. A credit item had been set up on the company's books in favor of the decedent of $25,000 on account of the transfer by him to the company of the capital stock of the Valley Contracting Company, as shown in finding 10.

**13.** The stock which was issued by the C. W. Hunter Company to the decedent was held by him until July 9, 1928, at which time he surrendered it to the corporation and had stock issued therefor to his children without consideration in money or money's worth, as follows:

| | Preferred | Common |
|---|---|---|
| Edward T. Hunter | 380 | 200 |
| Manuel J. Hunter | 340 | 300 |
| Chatham Hunter | 530 | 500 |
| Louise H. Coates | 400 | 200 |
| Florence H. Myers | 400 | 200 |
| Elizabeth H. Polk | 400 | 200 |
| Marie H. Glover | 400 | 200 |

**14.** The above distribution of the stock was decided upon after extended discussion among the children and after many varying allocations had been suggested. The decedent took little or no deciding part in these discussions, his attitude being that any division satisfactory to all the children would be satisfactory to him, as what he desired was harmony and satisfaction among them. One cause of difference of opinion among them was that some of them had already received greater advances than others and those advances were taken into consideration in making the stock division. Some of the children sought much greater amounts than were finally received, and the division as made was arbitrary and in the nature of a compromise after all conflicting claims had been considered and after taking into consideration previous advances to various children by the decedent.

Reporter's Statement of the Case

Walter and Frank Hunter did not participate in the stock distribution, since the other children felt that they had previously received advances at least equal to their share in the property. Walter did not even attend the conferences at which the distributions were decided upon, since some of the children had indicated their opinion that he had had his share and he consented to his entire elimination in order to avoid any controversy. Advances had previously been made to him as set out in finding 4. Frank Hunter was similarly eliminated from participation, since his father had also made advances to him.

**15.** In formulating the plan contemplating the organization of the corporation and the subsequent distribution of the stock thereof to the decedent's seven children, the said children agreed to create a trust to provide for Captain Hunter and his wife during their lives and during the life of the survivor. Pursuant to the agreement the aforesaid seven children of the decedent executed an indenture of trust in July 1928 transferring to two of them as trustees (Chatham Hunter and Louise H. Coates) the bonds which had been issued by the corporation to the decedent and which had been distributed to his children contemporaneously with the stock referred to in finding 12. Under the terms of the trust agreement an aunt in Canada was to receive $100 a month during the remainder of her life, and the trustees were required to provide, as nearly as possible, from the trust income $1,500 a month for the benefit of the decedent and his wife during their joint lives, or during the life of the survivor. The trustees, however, were given absolute power to direct the disbursement of the trust income for the decedent and his wife, or the survivor, and were given absolute discretion to determine the sum that should be distributed to or expended in behalf of the decedent and his wife, or the survivor.

The agreement further provided that the death of a beneficiary should terminate his or her interest in the trust, and that his or her proportionate part of the corpus of the trust should be distributed to the trustors according to their respective interests. The agreement also provided that all

costs, expenses, fees, and taxes incident to administering the provisions of the trust should be paid by the trustors, and that the obligation to contribute to such expenditures should constitute a lien upon the trustors' interest in the trust corpus. The trust was revocable at the option of the grantors.

**16.** August 3, 1923, the decedent was admitted to Johns Hopkins Hospital for treatment for bladder trouble and urinal incontinence. Up to that time he had had no serious illness and his general health had been good. His trouble was diagnosed as cerebrospinal syphilis and arteriosclerosis. Some of the observations made by the hospital staff at the time of his admission were as follows:

> Impression: No very definite abnormalities found on neurological examination. Probably has a generalized cerebrospinal arteriosclerosis which might easily account for sphincter disturbance if there is no local condition to explain it.
>
> * * * * *
>
> Examination: Patient is rather poorly nourished elderly man, apparently lost considerable weight recently.
>
> * * * * *
>
> Aug. 9, 1923. Psychiatric consultation. Mental status: Patient was lying fairly quietly in bed, was somewhat restless, moving his feet up and down. He talked fairly well, in a connected way, about himself and his sickness. There is no essential mood disturbance although the patient gives evidence of considerable lability in his emotional response. Small things bring tears to his eyes very quickly, a trait which he himself has noticed as becoming more pronounced in the last few years. No imaginations nor special preoccupation elicited. Sensorium: Is correctly oriented in all spheres; he complains of subjective memory difficulty extending over a period of two years; objective memory tests show considerable deficit and confusion; he gives his age as 78 but could not recall the names of Presidents, not even the name of Mr. Harding, although he was able to describe what had happened to him.
>
> * * * * *
>
> Impression: Character of many disturbances, together with the emotional lability, point to cerebral

arteriosclerosis. It seems impossible to say just how much of his bladder disturbances are due to arteriosclerotic changes.

* * * * *

August 8, 1923. Patient is being studied very carefully. There seems to be definitely some mental unbalance, has difficulty in following line of conversation. Neurological consultation negative. Psychiatric consultation ordered. At times there is no incontinence.

August 14, 1923. Patient seems to think that he is better. Has incontinence at times. Is extremely forgetful. Psychiatric consultation with impression, memory defect. Temperature normal.

August 23, 1923. No change of note in condition of patient.

He was discharged from the hospital August 31, 1923, in a somewhat improved condition. The following discharge notes were made by the attending physicians:

August 30, 1923. Discharge note (Dr. J. A. C. Colston): Patient has been treated for the past four weeks by prostatic massage, bladder irrigations, and instillations. His chief complaint has been urgency and inability to check flow of urine. There is only very slight enlargement of the prostate per rectum and cystoscopic examination showed also very slight enlargement in the bladder with small amount of residual urine. Patient has improved somewhat under treatment. Urine has been clear and uninfected. External genitalia normal. Urine G–1 is clear with numerous small shreds. Rectal: Anal sphincter good tone. Prostate is distinctly broader than normal. Median furrow and notch obscured. Lateral lobes are smooth, elastic, distinctly firmer than normal. Base of bladder soft. Seminal vesicles soft but thickened at their bases. Coude catheter enters bladder easily and finds no residual urine. Patient is discharged to report further progress in about one month.

August 31, 1923. Discharge résumé: Dr. Bidgood. Patient is an old man 78 years old, complaining of incontinence. Examination showed bladder capacity 75 cc and a residual of about 40 cc with distinct intravesicular hypertrophy of both lateral lobes and prostate. Phthalein was uncertain due to incontinence, blood urea 0.34. There was marked instability in this patient due, probably, to cerebral arteriosclerosis. During his stay

in the hospital patient received some bladder irrigations and on discharge catheter showed no residual urine. It was thought not advisable to operate upon him as he is an old man with small residual and very slight hypertrophy. He is to report in a month.

17. August 26, 1927, the decedent went to the Crisler Clinic at Memphis, Tennessee, where he was examined on account of certain numbness from the waist down, poor correlation of his physical faculties and some urinary difficulties. He was advised to go to the Methodist Hospital for a more complete and thorough examination. Pursuant to that advice he entered that hospital August 29, 1927, where his trouble was diagnosed as senility, mental changes, and arteriosclerosis. A description of his complaints upon admission to the hospital was in part as follows: "Patient has complained of lower extremities being cold and partially numb. Has poor control of lower extremities. Is continually complaining of leg being cold from knee down. Onset 5–6 years ago and has received treatment for same. For past three years has had incontinence, shortness of breath and easily excited." At the same time the decedent's condition was described as "marked nervousness and not responsible for all his actions. Wife states that he is 'playing piano' with hands and other useless motion. Talks at random and purposeless."

Dr. Hennessy who examined the decedent at the hospital diagnosed his trouble as arteriosclerotic changes which were demonstrable over the entire body and resulted in sclerosis of the bladder. Associated with the above ailments were certain mental irregularities which prevented proper correlation of his mental faculties, such irregularities being evidenced by his inability to correlate facts or statements given him and by meaningless movements and gestures which were not inspired by normal mental faculty. The examination also disclosed a disintegration of the muscles of his heart, which had resulted in advanced myocarditis or heart muscle disease. At that time the decedent presented the appearance of an aged man, physically impoverished, nervous, and in poor physical condition for a man of his age.

The decedent was discharged from hospital "unimproved" September 3, 1927. The above physician who examined him at the hospital saw him again about September 15, 1927, at which time his condition was unchanged. Improvement is highly improbable in a person of the decedent's advanced years and suffering from similar ailments. That physician did not see him again.

**18.** After his discharge from the hospital the decedent was also attended on one or two occasions by Dr. Rowland, who likewise had seen him at the time referred to in finding 17 when he was in the hospital. On those occasions he was suffering from attacks of weakness and general senility. At that time his mental condition was rather confused and he had the appearance of a very old man.

In addition Dr. Rowland was called January 5, 1929, to attend the decedent when he was suffering from acute bronchial pneumonia. The decedent had contracted influenza three or four days prior to that time, and this malady developed into bronchial pneumonia from which he died January 8, 1929. In his death certificate bronchial pneumonia was assigned as the principal cause of his death, with influenza as a contributory cause.

**19.** In 1923 the decedent took a trip to Canada where he visited relatives. In September 1925 he went to Florida in an open car. He was accompanied by two of his daughters and a young man who drove the car. They were away approximately four weeks and the decedent apparently felt no ill effects from the trip. He ate heartily and regularly, did not restrict himself in his diet, and gained weight. He was always able to travel as far as the rest of the group and in every way seemed to have a most enjoyable trip.

**20.** From 1917 to 1927 the decedent was president and a stockholder of the West Memphis Packet Company. That company owned a steamer, the Idlewild, to which the decedent was much attached. In 1927 the question arose as to the sale of the steamer but the decedent and H. H. Walton were opposed to the sale. Walton had been the engineer in charge of the steamer from 1917 to 1925. The majority, however, prevailed; the boat was sold in September 1927 for $35,000 and the corporation was dissolved. In January and February 1928 the decedent and Walton considered

the repurchase of the Idlewild and their considerations reached the point where in March 1928 Walton went to New Orleans for the purpose of negotiating the purchase. The transaction, however, was not carried out since the price asked, $50,000, was more than Walton and the decedent were willing to pay.

The decedent was able to express himself clearly and intelligently to Walton about the foregoing transactions and spoke for himself in respect thereto. In 1922, 1923 and 1924 the decedent talked to Walton about the former's desire to have Chatham Hunter take charge of his business after he finished school. His outlook on life during the period 1917 to 1927 was bright and cheerful and at no time did he discuss with Walton, with whom he was closely associated, the probability of approaching death.

**21.** In September 1928 the decedent went alone to his dentist and had a lower plate made. He talked intelligently and was able to follow the directions given to him by the dentist in carrying out the work. On the foregoing occasion the decedent evidenced an optimistic manner. The same dentist had served the decedent for many years and the optimistic manner which he showed when he was making his lower plate was similar to that which the dentist had known in prior years.

**22.** During the last half of 1928 the decedent went to his office almost daily, though he would remain for only about one-half an hour. He was not then engaged in any duties connected with the business and visited the office only on account of his continued interest therein and to see how the business was being conducted. He was not on a diet, ate normal meals, and was not under the care of a physician until a few days before his death. He was interested in baseball and moving pictures and attended baseball games and picture shows frequently during the last year of his life. On New Year's Day, 1929, he listened with interest to the football game at the Tournament of Roses in Pasadena, California.

**23.** The transfer made by the decedent July 9, 1928, of almost his entire estate (as shown in finding 13) was in lieu of a testamentary disposition and such transfer was made in contemplation of death.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The decedent, Charles W. Hunter, died January 8, 1929, at the age of eighty-five years. The property in question was actually transferred by the decedent to seven of his nine children July 9, 1928, about five months prior to his death. However, he had endeavored in June 1925 to transfer such property to trustees for the benefit of all of his children, which transfer was not completed by reason of a disagreement among the children as to the interests which they were to receive. The Commissioner of Internal Revenue determined that the property involved was transferred by the decedent in contemplation of death, and such determination must stand unless it is overcome by proof that the dominant motive of the decedent for making the transfer was other than contemplation of death. In our opinion the record not only fails to overcome the Commissioner's determination, but it requires the conclusion that the transfer in question was testamentary in character and was made in contemplation of death.

The decedent was in poor health in 1923 before he gave any serious consideration to the matter of transferring his property to his children. He went to Johns Hopkins Hospital August 3, 1923, where his condition was diagnosed as cerebrospinal syphilis and arteriosclerosis. He remained there under treatment until August 31, 1923, when he was discharged, without improvement of the illness with which he was found to be afflicted. The decedent returned to his home in Memphis and his condition appears to have grown worse.

In the latter part of 1923 or early in 1924 the decedent began considering the transfer of all of his property to his nine children. As a result of this deliberation he executed a common-law trust on June 9, 1925, equally dividing his entire property among all of his children. This division of the property was objected to by one of the children with the result that the transfer was not consummated. The decedent left the matter of agreeing upon a substituted plan entirely to his children. The trust was finally revoked and

in 1928 the decedent transferred all of his property, except an automobile and a life estate in the home in which he lived, to a corporation for stock. Six months later he transferred the entire stock of the corporation to his children without consideration in money or money's worth in the proportions agreed upon among the children.

Plaintiff contends that the impelling motives for the transfer by the decedent of all of his property to the children were (1) to accomplish a fixed purpose and desire which he had as early as 1913 to retire from active business and to place the management of his business with his sons; (2) to relieve himself from worries and responsibilities; (3) to equalize his bounty among his children; (4) to continue his policy of making gifts in his lifetime so that the children might be independently established; and (5) to protect himself from possible judgments and law suits which might arise out of operation of his business. With reference to alleged motives (1) and (2), the facts disclose that the decedent had retired from active business and had placed the management thereof with his sons long prior to the time the transfers in question here were made. This thought therefore did not, we think, prompt the decedent to dispose of his property when the transfer was made, inasmuch as he had previously divested himself of all responsibilities and worries connected with his business affairs. With reference to alleged motive (3), the facts show that the decedent gave no consideration in the final division of his property to equalizing the gifts made to his children. When he executed the common-law trust in June 1925, which had been under consideration by him since the latter part of 1923 or early in 1924, he provided for the issuance of certificates of beneficial interest to all his children. The certificates entitled each child to an equal share in his estate. In the trust provisions no consideration was given to advancements previously made to any of the children. They all shared equally under the trust. This trust was to become effective when the trustees had obtained the signatures of the beneficiaries named therein. The decedent did all that was required of him to make the trust effective and it probably would have become effective had not one of the children

objected to the manner in which the property was being divided. Thereupon a controversy arose among the children with reference to the interest which each of them should have in the property by reason of the fact that the decedent in the trust had given no consideration to prior advances made to two of his sons. Each child endeavored to obtain as large a share of the estate as possible and the decedent left to his children the matter of agreeing upon the division of his property. They finally agreed and also agreed upon the substituted plan hereinbefore mentioned, which the decedent carried out. With reference to alleged motive (4), that the decedent desired to continue his policy of making gifts in his lifetime so that the children might be independently established, the facts show that the children were already independently established. Walter and Frank Hunter were engaged in business for themselves; Edward Hunter had complete charge of field operations of his father's business; Chatham had complete charge of the administrative and financial ends of the business; and Manuel also worked for his father, both in the field and in the office. The four daughters were all married and the record does not show that they were in any way dependent upon the decedent. Moreover, the facts do not establish that the decedent had ever adopted a consistent policy of making gifts to his children during his lifetime. All that the facts show in this respect is, that at the time Walter and Frank Hunter entered business the decedent advanced some money to them for that purpose and, subsequently, when Walter became financially involved, the decedent paid certain notes which he had guaranteed at the time the obligation was contracted; that he gave one of his daughters sufficient money for a trip to Europe; and that he bore the expense of his younger son at Yale. These facts do not justify the conclusion that the decedent had adopted a generous policy of making gifts to his children during his lifetime in order to establish their independence, and the final distribution by the decedent of all his property to his children, at a time when his health and physical condition were such as disclosed by the record, cannot be considered as the continuation of such alleged policy. With reference to alleged mo-

tive (5), it appears that the law suits which had been instituted against the decedent under the penal statutes of Mississippi for cutting trees on property, which it was alleged he did not own or had not leased, had all been disposed of prior to the time when the transfers here in question were made. Moreover the decedent had fully protected himself against adverse results from further law suits of this character in organizing the Valley Contracting Company in March 1926, which company entered into contracts for the furnishing of willows. The decedent's personal estate was therefore entirely exempt from execution under any judgment that might be obtained against the Valley Contracting Company.

For the foregoing reasons and upon the facts in this case, we are of opinion that the transfer made by the decedent July 9, 1928, of practically his entire estate was in lieu of a testamentary disposition and that such transfer was made in contemplation of death (Finding 23). The plaintiff is therefore not entitled to recover and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## THE ACME MACHINE & WELDING COMPANY v. THE UNITED STATES

[No. 42421. Decided May 4, 1936]

*On the Proofs*

*Contract for repair of lightship engines; failure in operation of engines not due to contractor's fault.*—Where in the performance of a contract with the Government for furnishing and installing new crankshafts for old lightship compressor engines, the contractor met all the requirements of the contract except a requirement that the bearings should not pound nor heat, and the pounding and heating of the bearings were due, not to any fault of the contractor, but to preexisting defects in the subbases and crankcases of the engines, the correction of which was not within the requirements of the contract, the contractor is entitled to the contract price for performance.

*The Reporter's* statement of the case:

*Mr. Cooper B. Rhodes* for the plaintiff. *Mr. Fred B. Rhodes* was on the brief.

*Mr. Frank J. Keating*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, a corporation organized under the laws of the State of Alabama, has its principal place of business at Mobile, Alabama.

2. Plaintiff, on November 24, 1928, entered into a contract with the defendant. The contract provided that plaintiff for the price of $2,110 should furnish all labor, material, and equipment, and perform certain repairs on two compressor engines of Lightship No. 102.

Said contract read in part as follows:

SCHEDULE

Repairs Compressor Machinery—South Pass Lightship No. 102.

For furnishing all labor, material, and equipment to perform the following repairs to starboard compressor engine:

Remove present crankshaft, furnish and install new 4-inch crankshaft made of best quality, tested, open-hearth forged steel, finished all over, rebore and refit present main bearing brasses, realign all work, reassemble all machinery, and give engine a test trial of not less than 6 hours continuous running (fog horn to be blown continuously during these 6 hours at not less than 60 lbs. pressure), and bearings must not pound nor heat.

The vessel is now at the U. S. Lighthouse Depot, Choctaw Point, Mobile, Alabama, where the engine may be examined.

Bidder shall state below whether or not he will require vessel to be delivered to his plant.

Work to be performed at: Choctaw Plant.

Quick work is essential; State time for completion: 17 working days. For two engines: 24 working days.

Price for two engines ------------------------------ $2,110.00

Reporter's Statement of the Case

On November 24, 1928, E. S. Lamphier, Superintendent of Lighthouses, wrote plaintiff a letter, one paragraph of which reads as follows:

> It will be noted that specifications provide that the shafts are to be made of best quality *tested* open hearth forged steel. The material you propose to use should be stamped and certified to by an approved testing laboratory; if not, it will be necessary that you have tests made to conform to the following requirements;— Steel for forgings must be made by the open-hearth process, and must not show more than four one-hundredths of 1 percent of phosphorous nor more than five one-hundredths of 1 percent of sulphur and must be of the best commercial quality in all other respects. All forgings must be annealed unless otherwise directed. All forgings must be free from cracks, hard spots, foreign substances, pipes, and all other defects. Test specimens shall be taken parallel with the axis from each end of the shafts. One tensile specimen and one flat-bending test specimen shall be taken near the circumference and one tensile specimen at one-half of the finished radius from the center, at each end of the shaft. The tensile test specimens shall show a strength of not less than 60,000 pounds per square inch, and an elastic limit of at least 30,000 pounds per square inch, and an elongation of not less than 28% in two inches. The bending specimens, one-half by one-inch in size, shall stand cold bending double to an inner diameter of one-half inch without showing cracks or flaws; the two parts of the bent piece shall be parallel.

3. During 1928, and prior to the signing of the contract referred to in Finding 2 hereof, two firms other than plaintiff had repaired these compressor engines. One of said companies tuned up the crankshafts on one of the units, rebored the housing for the main bearings, and furnished and installed a new main bearing brass. The other company removed one of the crankshafts, trued it and rebored the housings, made new main brasses and reinstalled the shaft with the brasses and also made repairs to the cylinders. Upon the completion of this work the compressor units were not in satisfactory working condition. The crankshafts had lost their temper. It was decided to in-

stall new crankshafts. Plaintiff, before entering into the contract referred to in Finding 2 hereof, was informed by defendant's engineer of the trouble these former contractors were having with the old crankshafts, and that the bearings of the engines were heating up.

4. Plaintiff in the performance of its contract constructed the crankshafts to the apparent satisfaction of defendant's assistant lighthouse engineer, crated them with care, brought them to the Lightship, and installed them on the boat. The steel forgings for the shafts were tested by an approved laboratory, and the certificate was accepted by the Department of Commerce.

The port engine was run for fifteen minutes and the bearings heated badly. The crankshaft was returned to the shop. Upon checking up port crankshaft at the shop, it was noted that it was sprung .017 (seventeen thousandths of an inch), and had journal .005 taper, whereupon defendant's associate engineer Zibilitch rejected said crankshaft.

The crankshaft for the starboard engine was ordered back to plaintiff's shop because the rough finish of the main journals on the shaft might create friction with the brasses, thus preventing its cool and smooth running. While polishing the crankshaft, in order to rid it of the roughness, it was discovered that the shaft had been sprung. Plaintiff proceeded to straighten the shaft and succeeded in getting it within twenty-seven thousandths of an inch of being true. Defendant's representative then instructed plaintiff to send it to the ship and try it.

Representatives of plaintiff and defendant bedded the shaft, using new brasses and laid the shaft in. The engine was assembled and tested. When it had run about five minutes it became heated around the No. 1 crank pin. It was ascertained that the crank pin tapered nine thousandths of an inch. After four days, the taper of the No. 1 pin was reduced from nine thousandths to three thousandths of an inch. On trial, the engine then ran for about ten minutes before heating, but the shaft would not run cool.

During approximately ten days, the engine was tested and run during short periods of time. The bearings were

taken out and overhauled several times, grease cups were put on one side of the engine, and large sight feed oil cups on the other side, but still the engine would not run cool. The heat would start around the first or second main journal of the crankshaft and from there continue throughout its length.

It was the contention of defendant's representatives that the heating of the bearings was caused by the shaft not being true. Representatives of plaintiff contended, among other things, that the heating of the bearings was due to the fact that the bearings in the engines were composed of a kind of metal which differed from that recommended by the manufacturers of the engines; that they were not the original bearings that came in the engines, but had been furnished by two other companies; that there was a different ring to the mixture of the metal from the bearings that were originally found on board by plaintiff; that one had been poured in one foundry and one in another, and that they indicated both a hard and a soft metal. Finally it was agreed that plaintiff should bore out the bearings and fill them with white metal.

5. On April 3, 1929, a supplemental contract was entered into between the plaintiff and the defendant, whereby defendant agreed to pay plaintiff $750 to bore out the present main bronze bearings of the port and starboard compressor engines of the lightship, line the bearings with white metal, and fit them with not more than four thousandths of an inch clearance. Under date of April 3, 1929, defendant's superintendent of lighthouses sent plaintiff a letter, along with the supplemental contract, reading as follows:

> 1. Referring to your proposal in the sum of $750.00 for boring out bronze main bearings, ten in all, in port and starboard compressor units on board South Pass Lightship No. 102, enclosed herewith is an order to do the work.
>
> 2. * * *.
>
> 3. The decision is that the Government cannot say at this time that your company is relieved of all responsibility under the first contract as the cause of the trouble has not yet been determined, and, consequently, it is not certain whether the elimination of the trouble necessitates something you were required to do and

which it was not impossible for you to do. It would appear to be in the interest of your company to accept the order for work on the main bearings, as your liability would thus be less if the Government should be compelled to contract with someone else in a larger amount.

4. If, upon completion of the work specified in the new proposal, the machinery runs properly, then both contracts will be paid for in full. If the engines do not run properly and the trouble is not found to be something that should have been corrected under the terms of the first contract, your company will be relieved of all responsibility and both contracts will be paid in full.

5. You are assured that the work under the new proposal, when properly done, will be paid for regardless of your company's responsibility under the original contract, less any uncollected loss to the Government because of your default, if any.

Plaintiff rebored the bearings in its shop, as provided for in the supplemental contract, and relined them with white metal to the approval of defendant's representative. After completing the assembly of the engines they were tested and the bearings still heated. Plaintiff was then ordered to cease work on the compressors.

**6.** Thereafter the engines were removed from the ship and sent to the Charter Gas Engine Company at Sterling, Illinois, the original builders, where they were completely rebuilt. Such rebuilding included not only new crankshafts but other material replacements such as changed lubricating system, exhaust, reboring cylinders, planing of both sub-bases, top and bottom, which were found to be irregular and twisted.

**7.** The heating of the bearings during the tests hereinbefore mentioned was caused by the twisted and irregular sub-base and crankcase, resulting in certain inherent stresses, and by overloading. The metal used by plaintiff under the second contract had no connection with the overheating. The gradual breakdown of the engines after thirteen years' use also contributed to the heating of the main bearings. The heating of the compressor units was due

to causes which existed prior to November 1928, which, under the terms of either of the contracts hereinbefore mentioned, plaintiff was not required to correct. Such overheating was due to no fault of plaintiff, nor to any defect in material furnished under either of the contracts by the plaintiff.

8. Defendant has not paid plaintiff the contract price stated in the original contract. Defendant has paid plaintiff $750 for the work it performed under the supplemental contract. Under date of December 4, 1929, the Department of Commerce disapproved plaintiff's claim for $2,110, under the original contract, and the same was disallowed by the Comptroller General under date of January 29, 1930.

The court decided that plaintiff was entitled to recover the sum of $2,110.00.

MEMORANDUM BY THE COURT

The plaintiff seeks to recover $2,110 upon a contract dated November 24, 1928, the material part of which is set out in Finding 2, under which plaintiff agreed to remove and install new crankshafts in two compressor engines. Plaintiff furnished and installed the crankshafts, but defendant claims they did not comply with the contract and payment was therefore refused.

One of the specifications of the contract was that when the crankshafts were installed and the engine given the test, the bearings must not pound or heat. They failed to comply with this specification, and the parties to the case dispute as to the cause of this failure. We do not think it is necessary to discuss at any length the evidence in the case. The commissioner of this court has found as an ultimate fact that the overheating was due to no fault of plaintiff nor to any defect in the material furnished, and, after examining the testimony, we concur in this finding. The defendant relies to some extent upon the fact that after trial the shafts furnished were out of line, having been sprung, but this would not show that they were out of line when furnished. The evidence as a whole shows that the heating of

bearings and compressor units was due to causes existing prior to the date of plaintiff's original contract, namely, twisted and irregular sub-base and crank case which resulted in inherent stresses, and a gradual break-down of the engines after thirteen years of use. Under the terms of the contract plaintiff was not required to correct preëxisting defects, and the evidence shows that the engines had to be completely rebuilt in order to run properly. This fact tends strongly to show that plaintiff was not at fault.

Plaintiff, having performed its part of the contract, is entitled to recover as prayed in its petition. Judgment will be rendered accordingly.

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## THE HORN & HARDART COMPANY v. THE UNITED STATES

[No. 42529. Decided May 4, 1936]

*On the Proofs*

*Beverage tax; orange juice sold to restaurant customers with meals; statutory construction; particular enactment prevails over general enactment.*—Where there is in the same statute a particular enactment, and also a general enactment which in its most comprehensive sense would include what is embraced in the former, the particular enactment controls, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.

*Same.*—The fact that Congress in an enactment imposing a tax on unfermented fruit juices imposed the tax on only such as were intended for beverages with the addition of water or water and sugar, clearly indicates the intent that such juices intended for consumption in their natural state should be tax free. *Expressio unius est exclusio alterius.*

*Taxability of unfermented orange juice.*—Unfermented orange juice in its natural form, without the addition of water or water and sugar, prepared and served as part of a meal, held not subject to a beverage tax under section 615 of the Revenue Act of 1932.

*The Reporter's* statement of the case:

*Mr. D. Benjamin Kresch* for the plaintiff. *Messrs. Fred W. Weitzel* and *Norman J. Morrison* were on the brief.

*Mr. Joseph H. Sheppard*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant. *Mr. Sewall Key* was on the brief.

The court made special findings of fact as follows:

**1.** The plaintiff is a corporation of the State of New York with its principal place of business at 600 West 50th Street in the city and State of New York.

**2.** The plaintiff owns and operates a chain of restaurants in New York City.

**3.** During the taxable year 1932 plaintiff sold and served to its customers at its various restaurants, among other articles, 50,340.577 gallons of orange juice, on which it returned and paid a tax of 2 cents per gallon in amounts and on dates as follows:

| Gallons | Date of sale | Date of payment | Amount of tax |
|---|---|---|---|
| 5,216.97 | June | August 31, 1932 | $104.34 |
| 16,172.607 | July | August 31, 1932 | 323.45 |
| 14,602 | August | September 30, 1932 | 292.04 |
| 14,349 | September | October 31, 1932 | 286.98 |
| | Total | | 1,006.81 |

**4.** On November 21, 1932, plaintiff filed with the appropriate collector a claim for a refund of the total tax of $1,006.81 so paid, stated on the ground that the orange juice was not a taxable beverage within the meaning of the revenue acts and regulations thereunder.

**5.** July 6, 1933, the Commissioner of Internal Revenue rejected the claim in full on the ground that the orange juice was a still drink and subject to the tax imposed by section 615 (a) (4) of the Revenue Act of 1932.

**6.** The orange juice sold by plaintiff to its customers as hereinabove related was expressed from the orange by a process which retained in the juice the pulp of the fruit

and excluded the pits, and as thus derived was served to the customer without the addition of water, sugar, or other element, or any change from its natural state.

7. The excise taxes paid by the plaintiff upon the sale of orange juice were charged on its books to a special tax account styled "Indirect Expense." This account was also so charged with other taxes, such as tax on electricity.

The plaintiff did not decrease the size of the portions of orange juice sold, nor increase the price charged therefor at the time the tax was imposed nor subsequent thereto.

The plaintiff credits its receipts from the sale of orange juice to an account styled "Sales", and the cost of the oranges from which the juice is expressed is charged to an account styled "Food Purchases."

8. On September 5, 1934, plaintiff filed with the collector of internal revenue another claim for refund of the aforesaid tax of $1,006.81, stated as supplemental to the claim theretofore filed, and giving as a ground for refund, not referred to in the original claim, the alleged fact that the "taxpayer did not include in the price of the orange juice with respect to which it was imposed nor had it collected the amount of tax from the consumers to whom it sold the said orange juice."

On or about October 2, 1934, the Commissioner of Internal Revenue rejected the claim in full on the same ground as that on which the original claim had been rejected.

The court decided that plaintiff was entitled to recover.

**WILLIAMS, *Judge*, delivered the opinion of the court:**

The plaintiff, a corporation owning and operating a chain of restaurants in the city of New York, seeks to recover, with interest, the sum of $1,006.81 taxes paid during June, July, August, September, and October, 1932, on sales of 50,340.577 gallons of pure orange juice to its customers.

The orange juice sold by plaintiff was expressed from the fruit by a process which retained the pulp of the fruit and excluded the pits. It was served to customers with their meals, principally at breakfast time, without addition of water, sugar, or any other element, and without change

from its natural state. The tax was collected under the provisions of section 615 (a) of the Revenue Act of 1932 (47 Stat. 168, 264), which read:

> There is hereby imposed—
>
> (1) Upon all beverages derived wholly or in part from cereals or substitutes therefor, containing less than one-half of 1 per centum of alcohol by volume, sold by the manufacturer, producer, or importer, a tax of 1¼ cents per gallon.
>
> (2) Upon unfermented grape juice, in natural or concentrated form (whether or not sugar has been added), containing 35 per centum or less of sugars by weight, sold by the manufacturer, producer, or importer, a tax of 5 cents per gallon.
>
> (3) Upon all unfermented fruit juices (except grape juice), in natural or slightly concentrated form, or such fruit juices to which sugar has been added (as distinguished from finished or fountain sirups), intended for consumption as beverages with the addition of water or water and sugar, and upon all imitations of any such fruit juices, and upon all carbonated beverages, commonly known as soft drinks, except those described in paragraph (1), manufactured, compounded, or mixed by the use of concentrate, essence, or extract, instead of a finished or fountain sirup, sold by the manufacturer, producer, or importer, a tax of 2 cents per gallon.
>
> (4) Upon all still drinks (except grape juice), containing less than one-half of 1 per centum of alcohol by volume, intended for consumption as beverages in the form in which sold (except natural or artificial mineral and table waters and imitations thereof, and pure apple cider), sold by the manufacturer, producer, or importer, a tax of 2 cents per gallon.

The plaintiff did not decrease the size of the portions of orange juice served to its customers, nor increase the price charged therefor on account of the tax imposed, and in no way passed the tax on to the customers.

Subsequent to the payment of the taxes involved the plaintiff filed a claim for refund of the same on the ground that the orange juice produced and sold by it was not a taxable beverage. The Commissioner disallowed its claim on the ground that the orange juice sold was a still drink and subject to the tax under section 615 (a) (4) of the Revenue Act of 1932.

It is not contended that the orange juice produced and sold by plaintiff was taxable under section 615 (a) (3), which covers unfermented fruit juices in natural form "intended for consumption as beverages with the addition of water or water and sugar." The sole question presented, therefore, is whether it was subject to the tax imposed on still drinks by section 615 (a) (4).

Section 615 of the Revenue Act of 1932 is a substantial reenactment of section 602 of the 1921 Act. The language of section 615 (a) (4) of the 1932 Act dealing with still drinks is identical with section 602 (c) of the 1921 Act except that immediately following the word "upon all still drinks", the parenthetical expression "except grape juice" is added. Treasury Regulations 44 promulgated under the Revenue Act of 1932 interpret section 615 (a) (3) and (a) (4) as follows:

Section 615 (a) (3) of the Revenue Act of 1932.

ART. 28. *Scope of tax.*—The tax attaches to the sale by the manufacturer of all (a) unfermented fruit juices (except grape juice) in natural or slightly concentrated form, or such fruit juices to which sugar has been added (as distinguished from finished or fountain sirups), intended for consumption as beverages with the addition of water or water and sugar, and (b) all imitations of any such fruit juices.

The term "all unfermented fruit juices" includes logan and other berry juices, orange juice, lemon juice, grapefruit juice, lime juice, pineapple juice, and all other fruit juices.

The term "all imitations of any such fruit juices" includes those which resemble natural fruit juices in taste, appearance, or content and are advertised or sold for use as beverages with the addition of water or water and sugar.

Section 615 (a) (4) of the Revenue Act of 1932

ART. 32. *Scope of tax.*—The tax attaches to the sale by the manufacturer of all still drinks containing less than one-half of 1 percent of alcohol by volume. A still drink is one which is not charged, carbonated, aerated, or similarly treated. Where such drinks are compounded and sold by the glass it will be necessary for

Opinion of the Court

the manufacturer to keep such records as will clearly indicate the number of gallons sold and to pay tax thereon.

ART. 33. *Exempt sales.*—The tax imposed does not attach to the sale of (a) natural or artificial mineral and table waters, (b) imitations thereof, (c) pure apple cider, and (d) grape juice.

The Treasury Regulations interpreting the corresponding provisions of the 1921 Act are substantially the same as those issued under the 1932 Act. These regulations, which we think correctly interpret the respective taxing acts, justify the imposition of a tax of 2 cents a gallon on unfermented fruit juices, only when they are intended for consumption as beverages with water or water and sugar added, and not otherwise. Section 615 (a) (3) deals specifically with unfermented fruit juices and prescribes the precise form in which they are taxable—when intended for consumption as beverages with water or water and sugar added. Section 615 (a) (4) makes no reference to unfermented fruit juices and the assumption is not warranted that Congress intended to include them in the articles taxed under the general provisions of that subsection, the matter having been specifically dealt with in the preceding subsection, in which all unfermented fruit juices except those intended for consumption as beverages with the addition of water or water and sugar were tax exempt. One of the oldest rules of statutory construction is that, where there is, in the same statute, a particular enactment, and also, a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. *United States* v. *Chase*, 135 U. S. 255. The construction of the applicable statutes falls squarely within this rule. Section 615 (a) (3) is a particular enactment dealing with the tax on fruit juices, while section 615 (a) (4) is a general enactment dealing with the tax on still drinks. Even if unfermented fruit juices in their natural state might otherwise fall into

the classification of still drinks they are not taxable under subsection (a) (4) for the reason that they are specifically dealt with in subsection (a) (3) and are exempt from the tax there imposed.

We think that if Congress had intended to tax unfermented fruit juices intended for consumption as beverages in their natural state, it would have declared that intention directly, as could easily have been done by making all fruit juices, without exception, subject to the tax. Congress, however, did not do this but imposed a tax only on such unfermented fruit juice as was intended for consumption as a beverage with the addition of water or water and sugar, indicating clearly the intent that fruit juices intended for consumption in their natural state be tax free. *Expressio unius est exclusio alterius.*

The orange juice prepared by plaintiff and served in its natural form, without the addition of water or water and sugar, to customers as a part of a meal, was not subject to a tax of 2 cents per gallon under section 615 of the Revenue Act of 1932. The plaintiff is therefore entitled to recover the amount of the tax paid, and a judgment in its favor for $1,006.81 with interest is awarded.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## CONTINENTAL OIL COMPANY v. THE UNITED STATES

[No. 42573. Decided May 4, 1936]

*On the Proofs*

*Income tax; authority of corporation to act after expiration of charter; validity of waiver executed for corporation.*—Under the laws of Arizona a corporation whose charter expires by the voluntary action of its stockholders may continue to act for the purpose of closing up its business, and income-tax waivers executed for the corporation after such expiration of its charter are valid if executed by persons having authority to execute them.

Syllabus

*Validity of waiver by corporation; execution of waiver under implied authority.*—Income-tax waivers executed by officers of a corporation under their implied authority are valid, and officials of a corporation charged with the management of its fiscal affairs, particularly with reference to the making and filing of its income-tax returns have, in the absence of express provision otherwise, implied authority to execute waivers in respect of assessment of additional taxes on such returns.

*Who may act for dissolved corporation; validity of waiver; proof of express authority not necessary where implied authority appears.*—Where not otherwise provided who shall act for a dissolved corporation in closing up its business, the persons with authority so to act are its officials at the time of its dissolution, and it is not necessary to the validity of an income-tax waiver to show that the officer who executed it for the corporation had express authority to do so if it appears from the facts and circumstances that he had implied authority to execute it.

*Limitation on assessment against taxpayer's transferee.*—The time limitation on assessment of income tax against a taxpayer's transferee under section 280 of the Revenue Act of 1926 and section 311 of the Revenue Act of 1928 runs, not from the date upon which assessment *was made* against the taxpayer, but from the expiration of the time within which such assessment of the taxpayer could be made; and the assessment of the transferee here was within the time limitation therefor under the taxpayer's waivers extending the time for its, the taxpayer's, assessment.

*Liability of transferee for income tax due from transferror.*—The Mutual Oil Co. of Arizona in 1921 shortly before its voluntary dissolution, and without consideration, assigned and transferred to its sole stockholder, which by subsequent change of name became the Continental Oil Co. of Maine, all of its assets, which were more than sufficient to pay its existing income tax liabilities. Thereafter, in 1929, said Continental Oil Co. of Maine transferred all its assets and liabilities to the Marland Oil Co. (Delaware), which by change of name became the Continental Oil Co. (Delaware) the plaintiff herein. *Held*, that under sections 280 and 311 of the Revenue Acts of 1926 and 1928, respectively, the Continental Oil Co. of Maine became liable for an unpaid deficiency income tax due the Government from the Mutual Oil Co. of Arizona for the year 1918, and that by its transfer of its assets and liabilities, to the plaintiff, the Continental Oil Co. (Delaware), the plaintiff, in turn became liable to the Government for said unpaid deficiency tax for 1918.

*The Reporter's* statement of the case:

*Mr. Arthur B. Hyman* for the plaintiff. *Messrs. James J. Cosgrove* and *Charles H. Lieb* were on the brief.

*Mr. Guy Patten*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, a Delaware corporation, was duly incorporated under the laws of that State as the Marland Oil Company, in October 1920, changing its name to the Continental Oil Company in the year 1929.

2. The Mutual Oil Company of Arizona was incorporated under the laws of that State in the year 1909.

3. The Mutual Oil Company of Arizona, on August 15, 1919, filed its income and profits tax return for the fiscal year beginning March 1, 1918, and ending February 28, 1919, for itself and the Mutual Refining & Producing Company, an affiliate, with the Collector of Internal Revenue at Kansas City, Missouri. The return was signed by O. H. Williams as president and A. Herning as secretary of the Mutual Oil Company of Arizona and disclosed a tax liability for the period of $76,923.91, which amount was promptly paid by the company.

4. The Mutual Oil Company of Arizona, on December 31, 1921, assigned, transferred, conveyed, and released, without consideration, all its assets and property, real, personal, and mixed, to its sole stockholder, the Elk Basin Consolidated Petroleum Company, which company by subsequent changes in name became the Continental Oil Company of Maine. The value of the net assets so transferred by the Mutual Oil Company of Arizona and acquired by the Continental Oil Company of Maine was more than sufficient to pay existing income tax liabilities of the Mutual Oil Company of Arizona.

The Mutual Oil Company of Arizona was duly dissolved by decree of the Superior Court of Arizona on January 23, 1922.

5. The Commissioner of Internal Revenue, on February 7, 1924, upon audit and review of the tax liability of the

Mutual Oil Company of Arizona and its affiliate, mailed to the Mutual Oil Company of Arizona his thirty-day letter proposing a deficiency in tax of $21,785.82 for the period involved.

Thereafter, the Mutual Oil Company of Arizona filed with the Commissioner three waivers extending the period for the assessment. The first waiver was signed by O. H. Williams as president of the company, and extended the period for assessment to August 15, 1925. The second waiver, signed by A. Herning as secretary, extended the period for assessment to December 31, 1925, and the third waiver, likewise signed by A. Herning as secretary of the company, extended the period for assessment to December 31, 1926.

6. The Commissioner of Internal Revenue, on December 12, 1925, mailed to the Mutual Oil Company of Arizona a sixty-day letter proposing a deficiency of income and profits taxes against that company of $15,779.54 for the period beginning March 1, 1918, and ending on December 31, 1918.

The Mutual Oil Company of Arizona, on February 8, 1926, filed its petition with the United States Board of Tax Appeals for a review of the deficiency in tax set forth in the Commissioner's sixty-day letter. The Board, on January 25, 1929, entered its order sustaining the deficiency as determined by the Commissioner of Internal Revenue (14 B. T. A. 538).

On June 7, 1929, the Mutual Oil Company of Arizona filed its petition with the Circuit Court of Appeals of the Second Circuit seeking a review of the decision of the Board of Tax Appeals. The venue was laid in the Second Circuit Court of Appeals pursuant to a stipulation of the parties. The Circuit Court of Appeals dismissed the petition for a review, on October 1, 1931, for want of jurisdiction to entertain the appeal.

The Commissioner of Internal Revenue, on August 24, 1929, assessed the amount of the aforesaid deficiency, $15,-779.54 and interest thereon amounting to $3,310.03, or a total of $19,089.57, against the Mutual Oil Company of Arizona.

7. In June 1929, the plaintiff, then the Marland Oil Company (Delaware) acquired all the assets and property of the Continental Oil Company of Maine, and the right to the use of its name, under the terms of a "plan of reorganization agreement" entered into between the two corporations on April 30, 1929. This agreement among other things provided:

> First. Continental will sell and transfer and Marland will purchase all of the assets and properties and the right to the use of the name of Continental, subject to all liabilities of Continental, which liabilities Marland will assume and agree to pay from and to the extent of the assets so purchased and acquired.
>
> Second. In payment for the assets of Continental, Marland agrees to issue and deliver to Continental for distribution to its stockholders a number of shares of the no-par-value capital stock of Marland equal to the number of shares issued and now outstanding, namely, two million, three hundred seventeen thousand, two hundred sixty six and 35/100 (2,317,266.35).
>
> Fifth. CONTINENTAL OIL COMPANY will consent to the change of name of Marland Oil Company to Continental Oil Company and will render such assistance as may be necessary and desired to permit Marland Oil Company to qualify to do business in the States in which Continental Oil Company is now doing business under that name.
>
> Seventh. Upon the sale and delivery of assets and properties of Continental and the payment of the consideration therefor, Continental will proceed with reasonable dispatch to liquidate and dissolve and to distribute the stock of Marland to its stockholders entitled thereto.
>
> Eleventh. Marland will pay and discharge any Federal and/or State income tax liability to which Marland and/or Continental may be subject and will assume and pay all other liabilities which may arise or result from the carrying out of this plan of reorganization and agreement.

8. Pursuant to the foregoing plan of reorganization and agreement the Marland Oil Company increased its capital stock 100 percent, that is, by 2,317,266.35 shares, which it issued and delivered to the Continental Oil Company (Maine) for distribution to its stockholders in exchange

Reporter's Statement of the Case

for the assets of the Continental Oil Company (Maine). The approximate market value of the 2,317,266.35 shares of capital stock of Marland Oil Company so issued and delivered was $70,000,000. Thereafter, the Marland Oil Company (Delaware) changed its name to Continental Oil Company (Delaware), the plaintiff in this case.

The assets acquired by the plaintiff from the Continental Oil Company of Maine were more than sufficient to pay the existing liabilities of that company, including deficiency taxes due from the Mutual Oil Company of Arizona.

**9.** The Commissioner of Internal Revenue, on March 23, 1931, notified the plaintiff by a sixty-day letter, of a proposed deficiency assessment against it as transferee of the Mutual Oil Company of Arizona, for the taxes due from that company for the period of March 1 to December 31, 1918, both dates inclusive. The plaintiff did not file a petition with the United States Board of Tax Appeals for a review of the Commissioner's deficiency determination, and the Commissioner, on June 13, 1931, assessed the said deficiency against it, with interest thereon, in the amount of $21,662.22. The assessment was made under section 280 of the Revenue Act of 1926 and section 311 of the Revenue Act of 1928.

Upon demand and notice, the plaintiff, on June 29, 1931, paid the tax assessed against it.

**10.** On February 14, 1933, plaintiff filed its claim for the refund of $21,662.22, the amount of the tax assessed against it as transferee of the Mutual Oil Company of Arizona, stating the grounds therefor as follows:

(1) The assessment against Continental Oil Company (Delaware) was improper for the reasons that the Continental Oil Company (Delaware) was not the transferee of the assets of the Mutual Oil Company of Arizona, nor the transferee of a transferee of such assets.

(2) The assessment against and collection from Continental Oil Company (Delaware) was and is barred by the Statute of Limitations in such cases made and provided.

(3) There was no liability on the part of Mutual Oil Company of Arizona for the reason that if any such liability otherwise existed, the assessment and collection were

barred by the Statute of Limitations in such cases made and provided.

(4) There is no liability at law or in equity on the part of Continental Oil Company (Delaware) for any taxes that may have been due from Mutual Oil Company of Arizona.

The Commissioner disallowed the claim for refund on July 26, 1933, and the plaintiff filed its petition herein on December 29, 1933.

**11.** The liquidation of the Continental Oil Company of Maine had not been completely effected on March 23, 1931, the date on which the Commissioner's sixty-day letter was mailed to the plaintiff, and at that time had assets, presumably stock of the plaintiff, sufficient to pay the tax liability of the Mutual Oil Company of Arizona for the period in question, which was subsequently assessed against and paid by the plaintiff.

The plaintiff had no direct dealings with the Mutual Oil Company of Arizona, and that company at no time transferred any of its assets to the plaintiff. It is not shown whether any of the identical assets transferred by the Mutual Oil Company of Arizona to the Continental Oil Company of Maine on December 31, 1921, were included among the assets transferred by that company to the plaintiff on June 30, 1929.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, the Continental Oil Company, a Delaware corporation, seeks recovery of $21,662.22, with interest thereon, an amount assessed against it as the alleged transferee of the assets of the Mutual Oil Company of Arizona, for the period March 1, 1918, to December 31, 1918. The assessment was made on June 13, 1931, and, upon notice and demand, was paid by plaintiff on June 29, 1931. Timely claim for refund was filed, which claim was rejected by the Commissioner of Internal Revenue on July 26, 1933. The petition was duly filed on December 29, 1933.

The plaintiff contends—

First. The assessment was barred by the statute of limitations.

Second. There was no liability at law or in equity on the part of the plaintiff for any taxes that may have been due from the Mutual Oil Company of Arizona.

The assessment was made under section 280 of the Revenue Act of 1926, and section 311 of the Revenue Act of 1928. Section 311 of the 1928 act is a substantial reenactment of section 280 of the Revenue Act of 1926, which so far as here pertinent reads:

> (a) The amounts of the following liabilities, shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title. * * *.
>
> (1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law).
>
> (b) The period of limitation for assessment of any such liability of a transferee * * * shall be as follows:
>
> (1) * * * within one year after the expiration of the period of limitation for assessment against the taxpayer.

The first question to be determined is the date on which the period of limitation for assessment against the Mutual Oil Company of Arizona expired, as the assessment against the plaintiff as the alleged transferee of the assets of that company was barred unless made within one year thereafter.

The Mutual Oil Company of Arizona filed its income and profits tax return for the fiscal year beginning March 1, 1918, and ending February 28, 1919, on August 15, 1919. The five-year period provided in section 250 (d) of the Revenue Act of 1918 for the assessment of taxes on the return expired on August 15, 1924. The Commissioner's sixty-day letter notifying the Mutual Oil Company of the proposed deficiency assessment against it for the period involved was issued on December 12, 1925, more than

fifteen months after the expiration of the five-year period for assessment. The defendant, however, contends that this period was extended by certain waivers executed by the Mutual Oil Company of Arizona, and that the assessment against the plaintiff as transferee of the assets of that company was timely made under the waivers.

The Mutual Oil Company of Arizona, on December 31, 1921, assigned and transferred, without consideration, all its property and assets to the Elk Basin Consolidated Petroleum Company, which subsequently, through changes in name, became the Continental Oil Company (Maine). The Mutual Oil Company of Arizona was dissolved by the Superior Court of Arizona on January 23, 1922.

The waivers relied on by the defendant were executed by the former secretary of the Mutual Oil Company of Arizona, subsequent to the dissolution of the company, the last one extending the period for assessment until December 31, 1926.

The plaintiff contends that upon dissolution, on January 23, 1922, the Mutual Oil Company of Arizona ceased to exist and could thereafter exercise no corporate function; that its officers became *functus officio*, without authority to perform any act in the name of the corporation, and that, therefore, the purported waivers executed by the former secretary of the corporation were invalid and void. It further contends that even if the waivers be held valid the assessment against plaintiff as transferee, on June 13, 1931, was not made within a period of one year after the expiration of the period of limitation for assessment against the Mutual Oil Company of Arizona as extended by the waivers.

Section 2018 of the Revised Statutes of Arizona (1913) reads as follows:

> Corporations whose charters expire by their own limitations or by the voluntary act of the stockholders, may, nevertheless, continue to act for the purpose of closing up the business of such corporation, but for no other purpose unless renewed as in their charters provided.

Under the provisions of this statute the Mutual Oil Company of Arizona continued to exist after dissolution for the

specific purpose of closing up its business. To the extent necessary to accomplish that purpose its corporate powers remained unimpaired and it could perform in the corporate name any act necessary to that end. *Helvering* v. *South Penn Oil Company*, 68 Fed. (2d) 420. The adjustment of taxes due from the Mutual Oil Company of Arizona was among the things necessary to the closing up of its business. *Jaffee* v. *Commissioner*, 45 Fed. (2d) 679. The courts and the Board of Tax Appeals, in cases too numerous for citation, have upheld the validity of waivers executed by dissolved corporations during the period in which corporate existence was extended by statutes for the purpose of closing up their business. In these cases the question as to the validity of the waiver turned entirely on whether the person signing the waiver had authority to execute it.

The Arizona statutes, unlike the statutes of most of the States, in that respect, make no provision as to who shall act for a dissolved corporation in closing up its business, and the decree of the court dissolving the Mutual Oil Company of Arizona does not designate liquidating trustees. In this situation the only persons who could act on behalf of the dissolved corporation in closing up its business, it still being a going concern for that particular purpose, would be its authorized officials at the date of dissolution. An officer of the corporation who had authority to execute tax waivers on its behalf before dissolution, in the absence of a showing to the contrary, would have like authority to act on its behalf during the period of its extended existence after dissolution for the purpose of closing up the business.

It is not shown that the secretary had express authority to execute income tax waivers on behalf of the Mutual Oil Company of Arizona, nor is it necessary to the validity of the waivers that such showing be made, if it appears from the facts and circumstances of the case that he had the implied authority to execute them. Waivers executed by officers of a corporation under their implied authority are valid. *L. J. Christopher Co.* v. *Commissioner*, 55 Fed. (2d) 530; *Philip Carey Mfg. Co.*, v. *Dean*, 58 Fed. (2d) 737. Officials of a corporation charged with the management of its fiscal affairs, particularly with reference to the

making and filing of its income tax returns, have the implied authority to execute waivers in respect to the assessment of additional taxes on the return. *Independent Ice & Cold Storage Co.* v. *Commissioner*, 50 Fed. (2d) 31. The president and secretary of the Mutual Oil Company of Arizona signed the tax return for the period involved. The prompt payment by the company of the taxes shown to be due on the return was a clear recognition of the regularity of the action of these officials in signing and filing the return, and amounted to a confirmation of their authority in that respect. Being charged with this duty in connection with the company's income tax matters, the president and secretary undoubtedly, nothing to the contrary appearing, had implied authority to execute other necessary papers in relation to the assessment and collection of taxes on the return, including the statutory waivers usual in such cases. The waivers relied on by the defendant were therefore valid, and operated to extend the statutory period for assessment in accordance with their terms.

The deficiency assessment against the Mutual Oil Company of Arizona was made on August 24, 1929. The plaintiff says that the one-year limitation within which the Commissioner could make an assessment against a transferee of that company began to run on that date, and that since the Commissioner's sixty-day letter was not mailed to the plaintiff until March 23, 1931, one year and seven months thereafter, the statute of limitations had expired, and assessment against plaintiff, as transferee, was barred. In respect to this contention it is sufficient to refer to the specific provision of the statutes, that the period of limitation for assessment against a transferee shall be "within one year after the expiration of the period of limitation for assessment against the taxpayer." The timeliness of an assessment against a transferee is in no way dependent on the date on which assessment was made against the taxpayer, it being entirely immaterial whether such assessment was ever made. The requirement of the statutes is met if the Commissioner makes the assessment against a transferee within one year after the expiration of the date

on which assessment could have been made against the taxpayer.

The Commissioner's sixty-day deficiency notice was mailed to the Mutual Oil Company of Arizona on December 12, 1925. Two unexpired waviers were then on file, one extending the period for assessment to December 31, 1925, the other to December 31, 1926. These waivers were given under Section 277 (b) of the Revenue Act of 1924, which provides:

> The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

The taxpayer within sixty days after the mailing of the deficiency notice filed its appeal from the Commissioner's deficiency determination with the Board of Tax Appeals, and the appeal was pending before the Board when the Revenue Act of 1926 (44 Stat. 9) was passed. Section 274 (a) of this act provides:

> * * * Within sixty days after such notice [deficiency] is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided * * * no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such sixty-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final.

Section 277 (b) provides:

> The running of the statute of limitations provided in this section or in Section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under sub-

division (a) of Section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for sixty days thereafter.

Section 283 (b) provides:

> If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 * * *, and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except * * *. (The exceptions not here material).

Provision for a judicial review of the decision of the Board of Tax Appeals is provided in Section 1001 as follows:

> (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of Section 283 and subdivision (h) of Section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed either by the Commissioner or the taxpayer within six months after the decision is rendered.
>
> (c) Despite the provisions of sections 274 and 308, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect to such portion is filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed (and in any event before the expiration of six months after the decision of the Board is rendered) has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, * * * conditioned upon the payment of the deficiency as finally determined * * *.

In respect to the date on which the Board's decision becomes final it is provided in Section 1005:

> (1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or
>
> (2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or
>
> *  *  *  *  *

The Board of Tax Appeals, on January 25, 1929, entered its order sustaining the deficiency as determined by the Commissioner. The taxpayer thereafter, on June 7, 1929, within the six months' period in which it was permitted to do so, filed its petition seeking a review of the Board's decision. This petition, by stipulation of the parties, was filed with the Circuit Court of Appeals of the Second Circuit. The petition was dismissed by that court on October 1, 1931, for want of jurisdiction, the parties having mistakenly laid the venue in the wrong circuit. The taxpayer did not file a bond as required by section 1001 (c) of the Revenue Act of 1926, hence this appeal did not stay the assessment of the deficiency, and the running of the statute of limitations on the Commissioner's authority to make the assessment was not suspended during the period of its pendency before the Circuit Court of Appeals.

The Commissioner's sixty-day notice was mailed to the taxpayer on December 12, 1925, one year and nineteen days before the expiration of the last waiver on file. The effect of this notice, both under the terms of the waiver and the statute, was to suspend the running of the statute of limitations on the authority of the Commissioner to make the assessment until the decision of the Board of Tax Appeals became final, which in this case, eliminating the time in which the appeal from the Board's decision sustaining the deficiency determination of the Commissioner was pending in the Circuit Court of Appeals, was July 25, 1929, or six months after the entry of the Board's order on January 25,

1929. When there is added to this date the unexpired period of the waiver at the time the deficiency notice was mailed, twelve months and nineteen days, the expiration of the period of limitation for assessment against the taxpayer was August 13, 1930. The Commissioner's sixty-day letter was mailed to the plaintiff as transferee of the assets of the taxpayer on March 23, 1931, and the assessment against it as transferee was made on June 13, 1931, well within one year after the expiration of the period of limitation for assessment against the taxpayer. *Manz Corp.* v. *United States*, 74 C. Cls. 5, 54 Fed. (2d) 177; *Hoosac Mills Corp., et al.* v. *Commissioner*, 75 Fed. (2d) 462.

The assessment against the plaintiff having been made within the period of limitation in which an assessment could be made against a transferee of the Mutual Oil Company of Arizona, the validity of the assessment turns entirely on whether the plaintiff was liable at law or in equity for the taxes due from that company. The plaintiff contends such liability did not exist.

The taxpayer, on December 31, 1921, transferred all its assets of every kind and character to its sole stockholder, the Continental Oil Company of Maine, and soon thereafter dissolved. The transfer was without consideration and the value of the assets transferred was more than sufficient to pay any and all income and profits taxes then due from the taxpayer. The Continental of Maine thus became the transferee of the taxpayer, and as such was liable for the taxes in question. *Phillips, et al.* v. *Commissioner*, 283 U. S. 589. The Board of Tax Appeals in a recent decision (*Continental Oil Company* v. *Commissioner*, 34 B. T. A. 29, promulgated March 5, 1936) held that the Continental of Maine was liable in equity as transferee of the assets of the taxpayer, in respect to deficiencies in taxes of that company, for a taxable period other than that here involved. The Commissioner's sixty-day notice in that proceeding was issued to the Maine company prior to the transfer of its assets to plaintiff.

With the Continental of Maine liable for the tax in question and having sufficient assets to pay it, plaintiff (then Marland Oil Company), on June 30, 1929, acquired and took

over all the assets of that company under a "plan of reorganization agreement" previously entered into between the two companies. The agreement provided:

> * * * Marland will purchase all of the assets and properties and the right to the use of the name of Continental, subject to all liabilities of Continental, which liabilities Marland will assume and agree to pay from and to the extent of the assets so purchased and acquired.

And that—

> In payment for the assets of Continental, Marland agrees to issue and deliver to Continental for distribution to its stockholders a number of shares of the no-par-value capital stock of Marland equal to the number of shares issued and now outstanding * * *.

Immediately following the making of this agreement the Marland Company increased its capital stock by 100 percent, issuing 2,317,266.35 additional shares at a market value of $70,000,000, which it delivered to the Continental of Maine in exchange for its assets and property as provided in the agreement, and thereupon changed its name from Marland Oil Company (Delaware) to Continental Oil Company (Delaware), the plaintiff herein—as it was authorized to do under the terms of the agreement.

The reorganization agreement further provided that "Marland [plaintiff] will pay and discharge any Federal * * * Income tax liability to which Marland and/or Continental may be subject, and will assume and pay all liabilities which may arise or result from the carrying out of this plan of reorganization and agreement." The plaintiff therefore acquired the assets of the Continental of Maine subject to all its liabilities, including Federal income taxes, which plaintiff agreed to assume and pay from and to the extent of the assets so purchased and acquired. One of the subsisting obligations of the Continental of Maine was the payment of the deficiency in income taxes due from the Mutual Oil Company of Arizona, for which it was liable as the transferee of that company. This transferee liability was assumed by plaintiff; the plaintiff thereby stepped into the shoes of the

Continental of Maine as the transferee of the assets of the Mutual Oil Company of Arizona, and became liable at law and in equity for the payment of the deficiency in taxes of that company for the period involved.

It follows from what has been said that the plaintiff is not entitled to recover, consequently the petition must be dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## EDWARD D. BROWN v. THE UNITED STATES

[No. 42587. Decided May 4, 1936. New judgment, and opinion amended, October 5, 1936]

*On the Proofs*

*Income tax; compromise settlement; estoppel.*—The Commissioner of Internal Revenue accepted the taxpayer's proposal for a compromise settlement of his claim for refund of a deficiency payment of income tax and interest thereon, upon the basis of an agreed amount of tax liability, with interest, the balance of the payment to be refunded, with interest according to law, and pursuant thereto issued and sent the taxpayer a certificate of overassessment, together with a refund check in accordance therewith, but which did not take into consideration and give the taxpayer credit for a former compromise payment of certain additional or continuing interest on the deficiency. The check was accepted by the taxpayer, but not as full payment under the compromise agreement. *Held*, (1) that the taxpayer's proposal for compromise settlement, upon its acceptance by the Commissioner of Internal Revenue, became a contract between the parties; (2) that the taxpayer was entitled to credit in the compromise settlement for the former compromise interest payment by him, and (3) that the amount of the refund stated in the certificate of overassessment not having been in accordance with the compromise agreement, and not having been accepted by the taxpayer as in full settlement, he is not concluded by such acceptance or estopped to claim the balance due him under the agreement, notwithstanding the statement in the certificate that payment of the amount stated therein "is made and accepted in full settlement."

*The Reporter's* statement of the case:

*Mr. Frederick O. Graves* for the plaintiff. *Messrs. Miller & Chevalier*, and *John E. McClure*, were on the brief.

*Mrs. Elizabeth B. Davis*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff filed suit in this court on January 17, 1934, to recover $22,260.67 income taxes paid by him for the year 1918, together with interest thereon, a timely and sufficient claim for refund having been filed and disallowed. Thereafter, on March 16, 1934, the plaintiff wrote the Commissioner of Internal Revenue, in part as follows:

> * * * I am willing to settle the controversy upon a basis of a tax liability of $8,073.72, with interest thereon up to the date whereon payment was made by me, with the understanding that the difference between such tax liability (plus the interest thereon) and the total amount heretofore paid by me with interest as allowed by law, will be refunded to me.

2. Under date of August 13, 1934, the Assistant General Counsel, Bureau of Internal Revenue, recommended to the Department of Justice that plaintiff's offer be accepted and that a certificate of overassessment issue in the amount of $19,027.22.

3. Under date of September 13, 1934, the Commissioner of Internal Revenue was authorized and directed by the Attorney General to make administrative settlement in accordance with plaintiff's offer.

4. On December 31, 1934, a check covering the refund of $19,027.22, and interest thereon of $6,725.21, in favor of the taxpayer, was issued and forwarded to the Collector for the Second District of New York for transmittal to the taxpayer. The overassessment appeared on Schedule IT-54226. The certificate of overassessment issued to the taxpayer contained the following statement:

> This certificate of overassessment is issued pursuant to the direction contained in the letter from the Department of Justice dated September 13, 1934, and pay-

ment of the sum mentioned herein is made and accepted in full settlement of the issues involved in the case of *Edward D. Brown* vs. *United States*, now pending in the Court of Claims of the United States, and the dismissal of said action with prejudice.

5. Accompanying plaintiff's offer in settlement was a signed motion to dismiss the suit, which motion has been held in escrow by the Department of Justice until and when payment in settlement was accepted. Plaintiff denies full payment and declines authorization to file a motion to dismiss.

6. In April 1935, the defendant asked for the issuance against plaintiff of a rule to show cause why the petition should not be dismissed. The plaintiff answered on April 20, 1935, and the Court discharged the rule April 24, 1935. The plaintiff's answer raised the issue whether the plaintiff is entitled to a refund of a portion of certain interest compromised under the following circumstances:

(a) Plaintiff filed his 1918 tax return on or before March 15, 1919, showing a tax liability of $4,000.00 and paid to the defendant within the time prescribed by law the sum of $3,084.71 and the difference $915.29 was abated by the defendant.

(b) On November 5, 1927, the defendant assessed additional income taxes for 1918 against the plaintiff of $22,260.67 plus interest thereon at 6 per cent per annum from February 26, 1926 (date of passage of the Revenue Act of 1926) to November 5, 1927, amounting to $2,262.66, total demand of $24,523.33. The said $24,523.33 was not paid until January 29, 1929, at which time the defendant increased the demand by $3,473.58, representing interest at 12 per cent per annum from November 5, 1927, to January 21, 1929.

(c) On January 29, 1929, the plaintiff paid to the defendant the additional taxes of $22,260.67 plus the said interest thereon at 6 per cent of $2,262.66 up to November 5, 1927. With respect to the 12 per cent interest from November 5, 1927 to January 21, 1929 of $3,473.58 the plain-

tiff filed an offer in compromise in the sum of $1,736.79 (6 per cent on the additional assessment).

(d) This offer was approved by the Collector for the reason that no wilful attempt to evade the tax was shown, and was accepted by and with the consent of the Secretary of the Treasury in accordance with Section 283 (d) of the Revenue Act of 1926. The plaintiff was notified of the acceptance on April 12, 1929.

The court decided that plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff within the time required by law filed his 1918 income tax return showing a tax liability of $4,000. This amount, less $915.29 which was abated by the defendant, was duly paid.

Thereafter the Commissioner of Internal Revenue, on November 5, 1927, assessed additional taxes against plaintiff for 1918 in the sum of $22,260.67, plus interest thereon from February 26, 1926, to the date of assessment amounting to $2,262.66, or a total of $24,523.33. This amount was not paid until January 29, 1929, at which time the demand was increased by $3,473.58, representing interest at 12 per cent from the date of the additional assessment to January 21, 1929. The plaintiff filed an offer in compromise in respect to the 12 per cent interest mentioned of $3,473.58, which offer was duly accepted and the plaintiff paid in settlement of the same $1,736.79.

On February 7, 1929, plaintiff filed a claim for refund for $26,260.12, representing the amount of the additional taxes and interest paid for the year 1918, which claim was rejected by the Commissioner on May 29, 1929. Thereafter, on January 17, 1934, plaintiff filed suit in this court to recover the said taxes and interest.

On March 16, 1934, plaintiff wrote the Commissioner of Internal Revenue proposing to settle the controversy upon the basis of "a tax liability of $8,073.72, with interest thereon up to the date whereon payment was made by me,

with the understanding that the difference between such tax liability (plus the interest thereon) and the total amount heretofore paid by me with interest as allowed by law, will be refunded to me." The compromise offer of plaintiff was duly accepted by the responsible officers of the defendant, and on December 31, 1934 a check covering the refund of $19,027.22 and interest thereon of $6,725.21 in favor of the taxpayer was issued and forwarded to the Collector of Internal Revenue for transmittal to the taxpayer, together with a certificate of overassessment showing the computation of the overpayment on the basis of a tax liability for the year of $8,073.72. The overassessment of $19,027.22 was computed, as shown by the certificate, as follows:

| | | |
|---|---|---|
| Income Tax assessed: | | |
| Original account No. 318020 | | $4,000.00 |
| Additional, November 1927 List #1, page 1, Line O | | 22,260.67 |
| Interest | | 2,262.66 |
| Total assessed | | $28,523.33 |
| Less previously allowed | | 915.29 |
| Net assessment | | $27,608.04 |
| Tax liability | $8,073.72 | |
| Interest | 507.10 | |
| | | 8,580.82 |
| Overassessment | | $19,027.22 |

In the computation of the overpayment, the Commissioner did not take into consideration the $1,736.79 interest paid by plaintiff under the compromise agreement in respect to interest claimed by the defendant on the additional assessment of $22,260.67 from the date of assessment until the payment of the tax.

The certificate of overassessment which plaintiff received with the check for the amount shown to be due thereon, contained the following statement:

> This certificate of overassessment is issued pursuant to the direction contained in the letter from the Department of Justice, dated September 13, 1934, and payment of the sum mentioned herein is made and ac-

cepted in full settlement of the issues involved in the case of *Edward D. Brown* vs. *United States*, now pending in the Court of Claims of the United States, and the dismissal of said action with prejudice.

The plaintiff received the check for the amount of the overpayment, with interest, cashed the same, and has retained the proceeds. He has, however, refused to permit the filing of a motion to dismiss the case, which was placed with the defendant in escrow, on the grounds that there is an additional amount of $1,366.61 due under the compromise agreement, because of the failure of the Commissioner to take into consideration in his computation the interest payment of $1,736.79.

The compromise proposal submitted by the plaintiff was couched in plain simple words, and there can be no doubt as to their meaning. The plaintiff proposed to settle the controversy involved in this suit on the basis of a tax liability of $8,073.72 with interest thereon up to the date of the payment of the tax—the difference between such tax liability, plus interest, and the total amount theretofore paid by him was to be refunded with interest. The proposal was accepted by the defendant and thereby became a contract between the parties. *Lang-Kidde Co.* v. *United States*, 77 C. Cls., 280, 2 Fed. Supp. 768. The Commissioner in his computation of the amount—taxes and interest—theretofore paid by plaintiff in respect to his 1918 tax liability failed to include the interest item of $1,736.79, although that item was unquestionably a part of the "total amount" paid. It is immaterial that the payment was made under a compromise agreement, the defendant claiming at the time that a larger amount was due. The plaintiff, under the compromise agreement, was entitled to have this interest payment included in the computation of the "total amount" paid by him, the excess of which over the agreed tax liability of $8,073.72, plus interest, was to be refunded. Manifestly therefore the additional amount claimed was due plaintiff under the compromise agreement.

The defendant contends, however, that the plaintiff, having accepted the check in full settlement of all the issues

involved in the pending suit, is estopped and precluded from asserting claim for an additional amount. While the certificate of overassessment stated that payment of the sum mentioned therein was made and accepted in full settlement of the issues involved in the pending case, it is clear that the plaintiff did not so accept it as he refused consent to the filing of the motion to dismiss, and immediately made application to the Bureau of Internal Revenue for the payment of the amount claimed.

The principle of estoppel is not applicable under the facts disclosed. Under the agreement the amount to be refunded was a matter of simple computation. The certificate of overassessment showed on its face that the amount of the overpayment was understated in the amount of the interest item in question. There could be no bona fide dispute as to that, or as to the amount due under the agreement. In these circumstances the acceptance of the check does not estop the plaintiff from asserting claim for the additional amount actually due him under the compromise agreement.

The plaintiff in the petition alleges that he overpaid his taxes for the year 1918 in the sum of $22,260.67 and interest thereon in the amount of $3,999.45. Because of the compromise agreement of settlement the court has not been called upon to make a determination as to the amount of taxes actually due and has not done so. The compromise agreement of a tax liability of $8,073.72 for the period involved is accepted by the court as the basis for determination of the amount the plaintiff is entitled to recover on his petition. Upon this basis the plaintiff is entitled to recover the sum of $1,334.90 in addition to the amount already refunded and paid to him, and judgment in that amount is awarded, with interest at 6 per cent per annum from January 29, 1929, as provided by law.

It is so ordered.

WHALEY, *Judge*; LITTLETON, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

# COMMERCIAL CASUALTY INSURANCE COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 42591. Decided May 4, 1936]

*On the Proofs*

*Contract for plumbing in Government hospital; termination of contract for failure to perform; completion by surety; liquidated damages.*—The plaintiff was surety on the bond of the Murphy Plumbing Co. for the performance of its contract with the Government for certain plumbing in a United States veterans' hospital. Under the contract the Government, for lack of diligence in the performance of the contract, could either terminate the contractor's right to continue performance and have the work completed at the contractor's expense, for any extra cost, or it could permit the contractor to continue and complete performance and then charge it liquidated damage for any delay in completion. After part performance the contractor abandoned the work, and the Government terminated the contract and permitted the plaintiff to complete the work. *Held*, that the termination of the contract eliminated the liquidated damage clause, and that the Government was therefore not entitled to liquidated damage for delay in the completion of the contract work.

*The Reporter's* statement of the case:

*Mr. Robert C. Handwerk* for the plaintiff.

*Mr. Louis R. Mehlinger*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of New Jersey, and is engaged in the bonding and insurance business with its principal office in the city of Newark, New Jersey.

2. On September 27, 1929, the Murphy Plumbing Company, a corporation, entered into a contract (VBc-572) with the defendant whereby it undertook to furnish all labor and materials and perform all work required for the com-



plete installation of certain plumbing at the United States Veterans' Hospital, North Chicago, Illinois, for a consideration of $71,850, to which were added certain change orders, making the total contract price $72,677.33, in strict accordance with the specifications, schedules, and drawings, which were made a part of the contract, a copy of which is attached to the petition as Exhibit A and made part hereof by reference. Said specifications, a copy of which was filed herein on September 8, 1934, are also made a part hereof by reference.

3. On October 7, 1929, the Murphy Plumbing Company as principal and the plaintiff herein as surety executed a performance bond in favor of the United States in the penal sum of $36,000, whereby they jointly and severally bound themselves unto the United States for the faithful performance of said contract. A copy of said bond is attached to the petition as Exhibit B and is made a part hereof by reference.

4. Work on the contract was to commence promptly after date of receipt of notice to proceed and be completed at a date not later than that provided for in the contract for general construction, that is, on or before May 28, 1930.

5. On April 10, 1930, the Murphy Plumbing Company telegraphed the United States Veterans' Bureau that it was unable to proceed with its contract and that the Veterans' Bureau should take the necessary means to complete it. On April 14, 1930, the Veterans' Bureau telegraphed the plumbing company that its right to proceed with the work was terminated in accordance with Article 9 of the said contract, and on April 14, 1930, telegraphed the surety, plaintiff herein, confirming the same by letter dated April 15, 1930, as follows:

> Following telegram has today been sent to the Murphy Plumbing Company Chicago Illinois quote Reference to your telegram April tenth that you are unable to proceed with your contract at U S Veterans' Hospital North Chicago Illinois stop Bureau has been advised you have stopped work under this contract stop In accordance with Article nine of the contract you are hereby notified that your right to proceed with this

work is terminated stop Letter follows unquote Bureau understands you intend to complete this work advise immediately.

On April 15, 1930, the surety telegraphed the Veterans' Bureau as follows:

> Retel fourteenth Murphy Plumbing Company contract Veterans' Hospital North Chicago upon abrogation your contract with principal and formal tender completion to us as surety this company will immediately undertake completion stop Edwin Wilson our Washington attorney is authorized to pass upon details stop Suggest tender be made to us immediately so work can commence today.

On April 15, 1930, the said Wilson wrote the Veterans' Bureau at Washington as follows:

> In the matter of a contract for a plumbing system at the United States Veterans' Hospital, North Chicago, Illinois, wish to acknowledge receipt of three copies of contract to be entered into between the Commercial Casualty Insurance Company, and the United States Veterans' Bureau, and also four copies of the form of performance bond to be executed and accompany the contract; also with these several papers was the letter of transmittal from Col. Tripp, Chief of Construction Division.
>
> I am immediately forwarding these papers to the Commercial Casualty Insurance Company at Newark, with request that they be executed and returned by the following mail.
>
> I note, in accordance with the information from the Construction Division, that the contract with the Murphy Plumbing Company has been officially terminated, and I, as attorney for the Commercial Casualty Insurance Company, in writing, accept the tender by you to the Surety Company, of the right to complete this contract, the Murphy Company having defaulted, and its contract terminated, as aforesaid.
>
> I am notifying the home office this afternoon, over long distance telephone, to immediately, in turn, notify its sub-contractor at Chicago to proceed at once with the contract at North Chicago.
>
> In accordance with verbal understanding this morning, it is also noted that the Veterans' Bureau, through its proper official, has notified the Superintendent of

> Construction of the understanding that the Commercial Casualty Insurance Company will proceed with the completion of this contract.
>
> It is also understood that no further moneys will be paid to the Murphy Construction Company, but that all checks in future will be made payable to the Commercial Casualty Insurance Company at the proper time.

Upon default of the Murphy Plumbing Company, and the termination by the United States of its right to proceed under its contract for the installation of the plumbing work, and the tender of completion of said work to the Commercial Casualty Insurance Company, the Commercial Casualty Insurance Company elected to complete the work in pursuance of its undertaking as surety for the Murphy Plumbing Company, and, under date of April 15, 1930, entered into a contract with the Gormley Company, an Illinois corporation, for the completion of the plumbing work; under the terms of the contract the Gormley Company agreed to complete all of the work required under and in conformity with the terms of the original contract dated September 27, 1929, between the United States and the Murphy Plumbing Company for the sum of $58,600, this sum being subject to deductions and extras provided for in the original contract between the United States and the Murphy Plumbing Company, and to commence the work promptly, and maintain a sufficient working force and material supply on hand at all times to insure full completion, at a date not later than that provided in the contract for general construction, or at such other date as might be specified by the Government under its contract.

On April 15, 1930, the Veterans' Bureau wired its Superintendent of Construction at North Chicago, Illinois, the following:

> Commercial Casualty Insurance Company will Undertake Completion Murphy Plumbing Company Contract as Surety No Objection to Their Starting Work.

On April 18, 1930, the attorney for the surety wrote the Veterans' Bureau as follows:

> In the above matter, as attorney for the Commercial Casualty Insurance Company of Newark, New Jersey,

surety on the bond of the Murphy Plumbing Company, I am returning herewith three copies of the standard Government form of contract and four copies of standard Government form of performance bond, which were forwarded to the Surety Company for execution in carrying out the completion of this contract, the Murphy Company having defaulted, and your Bureau having terminated the Murphy contract.

This contract and performance bond are returned with the understanding that, according to our contention in the matter, this contract is not necessary; that when we executed the bond for the Murphy Plumbing Company we entered into a surety contract with understanding of our liability in the event that the Murphy Company failed and defaulted. This has happened, and the Murphy Company's contract has been terminated, which brings into active existence our contract for the completion, without loss to the Government, and which we are now ready to perform and complete, without any further formal contract.

According to my verbal understanding had yesterday with Mr. Schommer, Disbursing Officer, and also Mr. Baruch, of the Construction Division, the Surety Company will complete this contract with the understanding that no further payments will be made to the Murphy Plumbing Company, its contract having been terminated by the Government on April 14 last, and that all future payments will be made direct to the Commercial Casualty Insurance Company of Newark, New Jersey.

Please acknowledge receipt of this letter by return mail, so that I may advise my client of this understanding. The time is getting short for completion, and we do not wish to run into penalties.

6. At the time the surety company took over the completion of said contract the work thereunder was 30% complete.

7. The work under the plumbing contract was not completed until August 29, 1930, a period of 93 calendar days after the contract was to have been completed by the Murphy Plumbing Company, of which 15 days' delay was due to a strike which occurred at the work of the general contractor and 36 days' delay was caused by the work under the contract for general construction not being completed until August 5, 1930, aggregating 51 days' delay for which the plumbing contractor and the surety were excused under the provision of Article 9 of the contract.

8. After the surety, plaintiff herein, undertook the completion of the work, all payments were made direct to it. Upon final settlement the United States deducted from the unpaid balance of $12,135.23 the sum of $1,680 as liquidated damages for the remaining 42 days the work was delayed at $40 a day in accordance with paragraph 36 of the specifications. In completing the contract the surety expended the total sum of $58,845.27 and received from the United States Government the sum of $54,280.73, sustaining an actual loss of $4,564.54 in the completion thereof.

The court decided that plaintiff was entitled to recover $1,680.00.

WHALEY, *Judge*, delivered the opinion of the Court:

This case does not involve a question of fact. The only question presented for decision is the construction of Article 9 of the contract with the original contractor.

It appears that on September 27, 1929, the Murphy Plumbing Company entered into a written contract with the defendant to install certain plumbing in the United States Veterans' Hospital, North Chicago, Illinois, for the total consideration of $72,677.33. The Murphy Plumbing Company, as principal, and the plaintiff, as surety, executed a performance bond in favor of the United States for the faithful performance of the contract. The completion date was fixed as of May 28, 1930, and liquidated damages accrued thereafter.

On April 10, 1930, 48 days before the completion date, the Murphy Plumbing Company notified the defendant it was unable to proceed with the contract. On April 14, the defendant notified the Murphy Plumbing Company and its surety (the plaintiff in this case) that the right of the Murphy Plumbing Company to proceed with the work was terminated in accordance with Article 9 of the contract. The following day, the surety, the plaintiff in this case, telegraphed the Veterans' Bureau that if it would abrogate the contract with its principal and tender completion to it, as surety, it would immediately undertake completion and also expressed the desire to commence work at once. In

the letter written to the Bureau by its agent, the surety expressed the desire to undertake the work as the contract with the Murphy Plumbing Company has "been officially terminated" and the desire of a tender by the defendant to the surety company of the right to complete the contract. The surety also insisted as one of the conditions of undertaking the completion of the contract that all moneys be paid directly to it and not to the Murphy Plumbing Company. This undertaking on the part of the surety was in consideration of the balance due on the contract. Throughout the entire correspondence the surety insisted that the contract with the Murphy Plumbing Company be terminated before it would undertake to enter into a contract with the Government for completion.

The Government sent a formal written contract with a performance bond to the surety for execution. The surety company declined to execute this contract taking the position that it had agreed with the Government to complete the work remaining unperformed by the Murphy Plumbing Company. Immediately upon tender by the Government to the surety of the contract to complete the work and its acceptance by the surety, the latter entered into a contract with the Gormley Company in consideration of the amount remaining unpaid on the Murphy Plumbing contract and with the agreement that the Gormley Company complete the work within the time limit specified in the Murphy Plumbing Company contract.

The work was not completed within the time specified and the Government imposed upon the surety liquidated damages for 42 days' delay in the amount of $1,680.00. This suit is brought for the recovery of this amount and the solution of it requires an interpretation of Article 9 of the contract which reads as follows:

> ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has

been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

The only right to terminate the contract is found in this article. It provides that should the contractor refuse or fail to prosecute the work the Government has the right to terminate the contract, take over the work and prosecute the same to completion by contract or otherwise and the contractor and *his sureties* shall be liable for *any excess cost* occasioned the Government thereby. The second course the

Government has is provided in the next sentence which reads "If the Government does not terminate the right of the contractor to proceed * * *" then the contractor shall pay to the Government liquidated damages of a certain fixed sum for each day the contract is unperformed after the completion time has expired. The termination of the contract eliminates the liquidated damage clause. The election of one disposes of the other.

This case differs very slightly in its facts from the case of *The Fidelity and Casualty Company*, 81 C. Cls. 495, and basically is the same. In the *Fidelity case* the time limit had been reached and the contractor had not abandoned the contract when the Government terminated the contractor's right to proceed and subsequently allowed the surety to complete the contract. We held in that case no liquidated damages were recoverable.

In this case, it is true, the time for completion had not been reached and the contractor had abandoned the contract when the Government exercised its right under Article 9 to terminate the contract and subsequently award its completion to the surety. Under the termination clause in both cases the surety was only liable for any excess cost occasioned the Government by the exercise of this right. The correspondence between the surety and the Government, which makes the new contract for completion, clearly shows that the surety would not undertake the performance of the contract unless and until the contract with its principal had been definitely terminated. This is emphasized in the demand that all checks for future work be paid to it directly. If the original contract were in force the principal, and not the surety, would have been entitled to payment regardless of whether the work was performed by the principal or surety. The fact that the Government terminated the contract is controlling and when that right was exercised the provision for liquidated damages went out of the contract. The Government was not subjected to any excess cost.

The suggestion that contractors, finding it impossible to complete on time, may refuse to perform and thereby avoid the liquidated damage clause cannot be taken into con-

sideration. The fault, if any, is in the contract and not in the interpretation of its provisions.

The plaintiff is entitled to recover. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## CLARENCE D. HOLLAND v. THE UNITED STATES

[No. 42624. Decided May 4, 1936]

*On the Proofs*

*Navy Pay; officer retired under section 1453 R. S.; date of retirement.*—Where an officer in the Navy was retired from active service under section 1453 Revised Statutes, his retirement dates from the order of the President approving the recommendation of the Naval Retirement Board and directing his retirement, unless some other date was fixed in the order for retirement.

*Same; modification of prior order.*—Where the plaintiff, a naval officer ill in the hospital, received orders of June 25, 1926, directing him, upon discharge from the hospital, to proceed to his home and await orders; and the President on July 20, 1926, prior to plaintiff's discharge from the hospital on August 5, 1926, approved a recommendation of the Naval Retirement Board for plaintiff's retirement from active service under section 1453 Revised Statutes and ordered such retirement; and plaintiff was accordingly so retired to date from the President's order of July 20, 1926, and so notified July 26, 1926; the order of June 25, 1926, is to be held to have been modified by the subsequent orders for plaintiff's retirement, and his retirement held to have taken place on the date of the President's order, July 20, 1926.

*The Reporter's* statement of the case:

*Mr. George A. King* for the plaintiff. *King & King*, and *Mr. John W. Gaskins* were on the brief.

*Mr. Louis R. Mehlinger*, with whom was *Mr. Assistant Attorney General George C. Sweeney*, for the defendant.

Plaintiff, a commissioned warrant officer in the Navy, is receiving the retired pay based on twenty-seven years' service for longevity purposes. He brought this suit to recover $1,000, or more, on the ground that he is entitled

to retired pay from March 1, 1928, based on the completion of thirty years' service. In the computation of this claimed thirty years' service, he takes the position that he is entitled to either or both of the following periods of service: (1) the time spent by him in the hospital from July 20 to August 5, 1926, or, (2) the sixteen days from August 6 to August 21, 1926, in traveling from the hospital to his home.

The plaintiff, while on active duty, was transferred to the Naval Hospital January 4, 1926, and, while there, the President on July 20, 1926, signed an order directing that plaintiff be retired from active service and placed on the retired list in conformity with section 1453 of the Revised Statutes. The question therefore is whether the date of plaintiff's retirement was July 20, 1926, when the President ordered him retired, or August 5, 1926, when he was discharged from the Hospital, or on August 21, 1926, when he arrived at his home after leaving the hospital and found the notice from the Chief of the Bureau of Navigation advising him of his retirement.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

Plaintiff enlisted in the United States Navy April 8, 1896, and served in successive grades until he was commissioned chief gunner from January 31, 1913. Thereafter he received temporary appointments as ensign, lieutenant, junior grade, and lieutenant, when on December 31, 1921, he reverted to his permanent status as chief gunner. On October 28, 1930, he was notified that he was commissioned lieutenant on the retired list from June 21, 1930, in accordance with an act of that date.

While serving on board the receiving ship, Puget Sound Navy Yard, plaintiff became ill and on January 4, 1926, was sent to the Naval Hospital, Puget Sound, where his ailment was diagnosed as diabetes.

He was required to remain at the hospital and while undergoing treatment there received in due course the following order dated March 13, 1926:

> Your orders of 12 January 1926 assigning you to duty on the Asiatic Station are hereby revoked. Return them to the Bureau of Navigation for cancellation.

> You are hereby detached from duty on board the receiving ship at Puget Sound, Wash., and from such other duty as may have been assigned you; will continue treatment at the U. S. Naval Hospital, Puget Sound, Wash.

In May 1926 plaintiff was ordered to appear and did appear before the Naval Retiring Board for examination. The board found him incapacitated for active service by reason of diabetes mellitus; that his incapacity was permanent and the result of an incident of service.

While he was still at the hospital undergoing treatment, plaintiff in due course received the following order dated June 25, 1926:

> Upon being discharged from treatment at the U. S. Naval Hospital, Puget Sound, Wash., you will proceed to your home and wait orders.
>
> Immediately upon your arrival home, you will report your local address in full, and the date of your arrival to the Bureau of Navigation.

Subsequent to June 25, 1926, plaintiff was advised by the hospital officials that the retirement board had recommended his retirement.

July 20, 1926, the President approved the proceedings and findings of the Naval Retiring Board in plaintiff's case, and directed that he be retired from active service and placed on the retired list in conformity with the provisions of section 1453 of the Revised Statutes.

August 2, 1926, plaintiff in writing made the following request of the supply officer:

> Having completed thirty (30) years' service in the U. S. Navy on August 2, 1926, it is requested that my pay account be adjusted accordingly.

On August 5, 1926, plaintiff was discharged by his commanding officer from treatment at the hospital and proceeded to his home at Wiconisco, Pennsylvania, where he arrived August 21, 1926, and so reported. For the expense of his travel home the defendant has paid him mileage. Upon his arrival plaintiff found awaiting him the following communication from the Chief of the Bureau of Navigation dated July 26, 1926:

> You are advised that the Naval Retiring Board before which you recently appeared found you to be incapacitated for active service by reason of diabetes mellitus; that your incapacity is permanent and is the result of an incident of the Service.
>
> The President of the United States, under date of 20 July 1926, approved the proceedings and findings of the Naval Retiring Board in your case, and directed that you be retired from active service and placed on the retired list, in conformity with the provisions of section 1453 of the Revised Statutes.
>
> Accordingly, you have been placed on the retired list of officers of the United States Navy from the 20th day of July 1926, in accordance with the above-named provisions of law.

This was plaintiff's first information that he had been retired, and his first information as to the date of retirement. While at the hospital he had been told by the doctors that they had "ordered" him to be retired.

On July 20, 1926, plaintiff had completed 29 years, 11 months and 18 days of active service in the Navy, with over 12 years of commissioned service.

Plaintiff presented a claim to the General Accounting Office for the difference between the retired pay of a chief warrant officer of the Navy, with over 27 years of service, and the retired pay of such officer with over 30 years of service, from May 26, 1928, to December 31, 1932, which was denied by the Comptroller General May 1, 1933, on the ground that plaintiff's treatment at the hospital until August 5, 1926, did not have the effect of placing him in active service subsequent to July 20, 1926, or of increasing his length of service.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Section 1453 of the Revised Statutes provides as follows:

> When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay, as allowed by Chapter Eight of this Title.

In view of the positive provisions of that section that an officer *shall be retired from active service* when the President approves the decision of the retiring board, we see no escape from the conclusion that the officer was in fact retired from active service on the date of the President's order. The time subsequently spent undergoing treatment at the hospital pursuant to orders previously issued for that purpose cannot be considered as service performed on the active list and cannot be counted for longevity purposes to increase the retired pay. In *Terry* v. *United States*, No. 28148, decided March 30, 1908 (81 C. Cls. 958), this court said:

> * * * An order of the President placing an officer of the Navy upon the retired list * * * changes the status of such officer wherever he may be and whatever duty he may be performing; and thereafter he is entitled to retired pay only, unless such status is changed by some subsequent order of the Secretary of the Navy. * * * It may be that the Secretary of the Navy might issue a preliminary order in terms assigning an officer to duty after retirement, but such order should be certain in its terms and not given that effect by strained construction.

Plaintiff was in a retired status on and after July 20, 1926, when the President approved the decision of the retiring board and ordered the plaintiff placed on the retired list. No orders of any kind were subsequently issued giving plaintiff an active-duty status after retirement. This court is not at liberty to change the record. *Rogers* v. *United States*, 59 C. Cls. 464. It has been uniformly held that in the absence of orders prior to retirement definitely assigning an officer to duty after retirement, or orders issued subsequent to retirement for performance of active duty, an officer's active-duty pay ceases on the date on which he was ordered to be placed on the retired list. 17 Comp. Dec. 533, 536; 18 Comp. Dec. 747, 750; 32 Atty. Gen. Op. 176, 178.

Retirement constitutes a change of status and is, by reason of the mandatory provisions of section 1453 of the Revised Statutes, effective on the date the action is taken by the President, unless some other date is fixed in the order. Since only service performed in an active-duty status may be counted for increased pay, plaintiff's right to active-duty

pay and credit for longevity incident thereto under the orders of June 25, 1926, to proceed home and await orders upon being discharged from treatment at the hospital, was modified by the order of July 26, 1926, transferring him to the retired list from the date of the President's action on July 20, 1926. For these reasons the plaintiff cannot recover and the petition must be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## FRANK H. GAGE, SURVIVING PARTNER OF ROUSMANIERE, WILLIAMS & CO. v. THE UNITED STATES

[No. 42625. Decided May 4, 1936.]

*On the Proofs*

*Profits tax; account stated; statute of limitation.*—Where the taxpayer filed an informal claim for refund based upon a request for special assessment which claim was later perfected by formal claim for refund, and the Commissioner of Internal Revenue subsequently allowed the claim and issued a certificate of overassessment therefor, but erroneously withheld payment of a portion of the allowed overpayment which had not been paid at the time of the filing of the informal claim for refund as not being covered by the refund claim; there was an account stated for the full amount of the Commissioner's allowance, and suit could be brought by the taxpayer for the balance of the overpayment at any time within 6 years after such statement of the account.

*The Reporter's* statement of the case:

*Mr. Frank L. Warfield* for the plaintiff. *Mr. Stanley Worth* was on the brief.

*Mr. J. W. Hussey*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

Plaintiff sues to recover $8,316.34 with interest, representing the balance of an overpayment for 1917 in respect of the profits tax of Rousmaniere, Williams & Company, a

partnership, for 1917. The Commissioner of Internal Revenue refunded $20,650.85 of an overpayment of $28,967.19 determined and allowed for 1917 but declined to pay the balance of $8,316.34 on the grounds (1) that this portion of the overpayment was made after the refund claimed by the partnership was filed and (2) that a claim for refund could not be made before a tax was paid. In this the Commissioner erred for the partnership had made written claim for refund on the ground on which the overpayment was determined after the entire tax had been paid and also after the Commissioner had allowed the overpayment. Plaintiff alleges a statement of account showing a balance due and brought this suit within six years after receipt of notice of the amount of the overpayment for which the claim was allowed. The defendant denies that there was any statement of account in favor of the partnership and contends that this suit was barred at the time it was instituted.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Rousmaniere, Williams & Company was a partnership formed March 31, 1915, with its principal office and place of business at Boston, Massachusetts. During the year 1917 this partnership was composed of Frank H. Gage, George C. Allen, George A. Lapham, Zenas Sears, and Richard A. Harrington. It was voluntarily dissolved December 31, 1928. Sears died in 1927, Allen died about two years after the dissolution of the partnership, Harrington died November 20, 1934, and Lapham died after this suit was instituted, and Gage is the sole surviving partner.

2. In April 1918 the partnership filed its profits tax return for the fiscal year ended September 30, 1917. The profits tax liability shown due in the amount of $98,638.15 was immediately assessed and was paid June 15, 1918. Upon audit of the partnership return the Commissioner of Internal Revenue in September 1919 assessed an additional profits tax of $2,627.49 which was paid September 28, 1919.

3. A revenue agent made an investigation of the books and records of the partnership and its return for 1917 and as a result of certain adjustments recommended an addi-

tional profits tax. The record does not disclose whether the Commissioner sent to the partnership a proposed deficiency notice or whether any hearings were had on the revenue agent's report prior to December 9, 1919. However, the partnership was furnished with a copy of the revenue agent's report and on December 9, 1919, the partnership prepared and filed with the Commissioner a brief in which it discussed all of the items of income, deductions, and invested capital entering into its tax liability for 1917 and claimed that its tax should be reduced. In this brief the partnership also made an informal claim for refund on the ground that it was entitled to have its profits tax for 1917 computed under the relief provision of section 210 of the Revenue Act of 1919 and made application to the Commissioner that the profits tax be so determined and computed and that it be given the benefit of whatever relief might be afforded thereby. Before the Commissioner considered or acted upon the application for special assessment he determined and assessed an additional profits tax of $11,400.59 under section 201 of the act of 1917, which additional tax, upon demand, was paid April 26, 1921. Also, before he considered and acted upon the application for special assessment he made a further audit of the return and determined and allowed on November 24, 1922, an overassessment of $3,084.25 which was credited against an additional tax found to be due by the partners for 1918.

4. March 9, 1928, the partnership filed a claim for refund of $25,000, or such greater amount as might be legally refundable, for the fiscal year ended September 30, 1917, and in support thereof gave the following reasons:

> This formal claim is filed to complete the claim made in the year 1920 [Dec. 9, 1919] for a determination of the excess-profits tax under the provisions of section 210 of the Revenue Act of 1917.
>
> In reference to this original claim attention is invited to brief filed by George H. Inston, attorney for the taxpayer.
>
> A brief will be filed in support of this claim and a conference with the Bureau is requested.

5. April 30, 1929, the partnership filed another formal claim for refund of $25,000, or such greater amount as

might be legally refundable, for the fiscal year ended September 30, 1917, and in support thereof gave the following reasons:

> This claim for refund is filed in accordance with Treasury Decisions 4265 and 4266.
> Claims were filed within the regular statutory period requesting that the excess-profits tax be determined under section 210 of the Revenue Act of 1917.

**6.** September 15, 1928, the Commissioner mailed to the partnership a letter setting forth, among other things, the result of his examination of the partnership's claims for refund, and his determination of an overassessment of $28,967.19. The last two paragraphs of this letter stated as follows:

> In accordance with the foregoing your claim for the year 1917 will be allowed for $28,967.19.
> The overassessment shown above will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 284 of the Revenue Act of 1926 unless within thirty days from the date of this letter you advise the Bureau that you desire a conference or wish to file a protest.

The partnership was satisfied with this determination and acquiesced therein. No protest of any kind was made. Following the mailing of this letter the Commissioner, on October 9, 1928, allowed an overpayment of $28,967.19 for 1917 in favor of the partnership and scheduled the same to the collector at Boston with instructions to that official to check his records and report the condition of the taxpayer's account. This the collector did and made appropriate entries on the schedule showing the entire amount to be refundable with interest. This action was taken by the collector on October 30, 1928. The schedule containing the information above mentioned from the collector reached the Commissioner on or before November 19, 1928. The original certificate of overassessment prepared October 9, 1928, for delivery to the partnership showed the entire overassessment of $28,967.19 as allowed. This certificate of overassessment was not delivered to the taxpayer for the

reasons hereinafter stated. But a new certificate of overassessment was later prepared on June 1, 1929, and delivered June 9, 1929, as hereinafter set forth.

Upon receipt by the Commissioner of information from the collector that the entire amount of $28,967.19 was refundable, the Commissioner on or about November 19, 1928, entered in columns 8 and 9, respectively, of the schedule approved October 9, 1928, (1) interest of $16,428.16 due and payable on the overpayment of $28,967.19 and (2) the total amount of $45,395.35, tax and interest to be paid to the partnership by the disbursing clerk, and the disbursing clerk was instructed to make payment accordingly. However, before the overpayment and interest totaling $45,395.35 was actually paid to the partnership some one in the Commissioner's office raised the question whether the entire overpayment of $28,967.19 for 1917 was legally refundable in view of the fact that the original informal claim for refund filed by the partnership was filed December 9, 1919, which was prior to the payment on April 26, 1921, of the second additional assessment of $11,400.59. As a result the refund of the allowed overpayment of $28,967.19 with interest theretofore computed in the amount of $16,428.16 was held up and the Commissioner submitted to the General Counsel of the Bureau of Internal Revenue the question whether the entire overpayment of $28,967.19 with interest was legally refundable. Prior to June 9, 1929, the General Counsel of the Bureau submitted a decision to the Commissioner in which he ruled that inasmuch as the partnership paid only $101,265.64 prior to December 9, 1919, which was the date on which the informal claim for refund on the ground of special assessment was filed, only $20,650.85 representing that portion of the total overpayment which had been paid prior to December 9, 1919, could be refunded. The ground upon which the General Counsel based its decision that $8,316.34 of the total overpayment of $28,967.19 was barred by the statute of limitation was that the partnership had made no claim for refund of that portion of the overpayment amounting to $8,316.34 subsequent to payment of that amount on April 26, 1921, and inasmuch as the partnership's original claim for refund was filed December 9, 1919, only

that portion of the total overpayment which was paid prior to December 9, 1919, could be legally refunded. On the basis of this ruling the Commissioner on June 1, 1929, prepared and mailed to the partnership a new certificate of overassessment as follows:

> An audit of your income-tax return, forms 1065 and 1102 and a consideration of all the claims (if any) filed by you for the fiscal year ended September 30, 1917, indicates that the tax assessed for this year was in excess of the amount due:

| | |
|---|---|
| Tax previously assessed: Account #1801544 | $98, 638. 15 |
| Additional tax, Sept. 1919 list, page 5000, line 0 | 2, 627. 49 |
| Additional tax, Jan. 1921 list, page 39, line 34 | 11, 400. 59 |
| Total assessed | 112, 666. 23 |
| Tax liability | 80, 614. 79 |
| | 32, 051. 44 |
| Previously allowed, IT-A-3553 | 3, 084. 25 |
| Overassessment | 28, 967. 19 |
| Barred by statute | 8, 316. 34 |
| Amount allowable | 20, 650. 85 |

> The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)
>
> Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.
>
> Respectfully,
>
> C. B. ALLEN,
> *Deputy Commissioner.*
>
> Abated: $
> Credited: $
> To tax. Year
> Credited:
> To tax. Year
> Refunded: $20,650.85.
> Interest: $13,357.40.

On the margin of this certificate appeared this notation in pen and ink: "Sec. 284 (b) and (h) (1) Rev. Act of 1926. Claim for refund filed Dec. 9, 1919."

This certificate of overassessment and a check for $20,650.85 of the total overpayment of $28,967.19, together with interest of $13,357.40 totaling $34,008.25, were received by the partnership June 9, 1929.

7. The partnership submitted to its counsel the matter of securing the payment by the Government of $8,316.34, representing the balance of the overpayment for 1917 which the Commissioner had on September 15, 1928, advised the partnership would be allowed and refunded, but which he deducted from the refund check on the ground that payment was barred because no claim for refund had been made therefor. Accordingly the partnership through its counsel filed with the Commissioner on October 22, 1929, a written application and brief requesting payment of $8,316.34 representing the unrefunded balance of the overpayment for 1917. October 31, 1929, the Commissioner denied this application and refused to pay the balance claimed. Thereafter the partnership filed with the Commissioner a written application requesting that he reconsider his action in declining to refund the balance of $8,316.34 of the overpayment for 1917 and this application was finally denied by the Commissioner January 25, 1934. This suit was instituted March 27, 1934.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The partnership of Rousmaniere, Williams & Company filed an excess profits tax return for 1917 upon which a profits tax of $98,638.15 was computed and paid June 15, 1918, and thereafter in September 1919 the Commissioner made an additional assessment of $2,627.49 which was paid September 28, 1919. A revenue agent had made an audit and investigation of the books and records of the partnership in connection with its return filed for that year and recommended an additional excess profits tax assessment against the partnership, and also found and recommended certain overassessments of individual income taxes in respect of the income tax liability of the five partners. On December 9, 1919, the partnership filed with the Commis-

sioner a brief of ten pages in which all the items of income and deductions entering into the income and profits tax liability of the partnership for 1917 were discussed, and in this brief an informal claim for refund was made on the ground that the partnership was entitled to special assessment under section 210 of the Revenue Act of 1917, and an application was made to the Commissioner in the brief to grant special assessment and to give the partnership the benefit of any relief in respect of its profits tax liability to which it was entitled under section 210. This brief was not made in the usual form of a claim for refund and was not sworn to. However, on March 9, 1928, before the Commissioner had acted upon the application for special assessment, but after he had finally determined the net income of the partnership and the profits tax liabilities under section 201, the partnership filed a formal claim for refund of $25,000, or such greater amount as might be legally refundable, on the ground that it was entitled to special assessment under section 210. This formal claim was filed to perfect and complete the informal claim theretofore filed on December 9, 1919. At the time this refund claim was filed all taxes determined and assessed for 1917 had been paid. This claim was promptly transmitted to the Commissioner by the collector and was received in the Commissioner's office March 17, 1928. Thereafter the Commissioner, before he had completed his audit of the return of the partnership for 1917 in connection with its claim for special assessment and before he had acted upon the foregoing refund claims, published Treasury Decision 4266. This Treasury decision provided that in order for an informal claim for refund to be allowable it would be necessary for a taxpayer who had filed an informal or imperfect refund claim to perfect the same by a formal claim for refund filed on or before May 1, 1929. After the promulgation of this Treasury decision the partnership on April 29, 1929, executed a formal claim for refund for 1917 for $25,000 on the ground of special assessment, which claim was filed April 30, 1929, formally to perfect any informality or imperfections in the previous claims filed on December 9, 1919, and March 9, 1928.

Opinion of the Court

In this suit plaintiff seeks to recover the amount of $8,316.34 with interest, representing the unrefunded portion of the overpayment of $28,967.19 finally determined and allowed by the Commissioner. There is no controversy concerning the overpayment.

Plaintiff contends that there was an account stated for $28,967.19 for 1917 and that this suit, which was instituted within six years after the statement of such account, was timely.

Counsel for the defendant insists that there was no statement rendered by the Commissioner showing a balance due in favor of the partnership for 1917 and that this suit was barred by section 3226 of the Revised Statutes, as amended, at the time it was instituted.

Under the facts and circumstances in this case, we are of opinion that the Commissioner stated the account for 1917 showing a balance in favor of the partnership, and that inasmuch as this suit was instituted within six years thereafter it is not barred. The Commissioner on September 15, 1928, after the partnership had filed informal and formal claims for refund, advised the partnership that he had determined an overassessment of $28,967.19 for 1917, and that its claim for refund for that amount would be allowed and that such amount would be credited or refunded unless the partnership within thirty days from that date advised the Bureau that it desired a conference or wished to file a protest in respect of the amount for which the claim had been allowed. The overassessment disclosed resulted from the allowance of special assessment. It was acceptable to the partnership, and no protest of any kind was made. Accordingly, the Commissioner on October 9, 1928, in accordance with section 1116 of the Revenue Act of 1926, allowed the overpayment of $28,967.19, and the collector on October 30, 1928, reported to the Commissioner that the entire amount was refundable. However, the Commissioner when he came to pay the refund of $28,967.19 and interest made a mistake of fact in holding with respect to $8,316.34 of the overpayment that the partnership had not claimed a refund after payment and that only that portion of the total al-

lowed overpayment of $28,967.19, which had been paid prior to December 9, 1919, when the informal claim for refund was filed, was refundable. When the Commissioner made this mistake of fact he had already advised the partnership on September 15, 1928, that $28,967.19 was due it and, in addition, he had already, on October 9, 1928, allowed an overpayment in favor of plaintiff for $28,967.19 in accordance with his letter of September 15, 1928, and knew that the entire overpayment was refundable. There was no support in fact or in law for the position taken by the General Counsel of the Bureau that the amount of $8,316.34 of the overpayment could not be refunded because no claim for refund had been made after that portion of the overpayment had been paid on April 26, 1921. The partnership did on March 29, 1928, make a formal demand and claim for refund of $25,000, or such greater amount as might be found to be legally refundable, on the ground of special assessment, and on April 30, 1929, made a further formal demand and claim for refund of $25,000, or such greater amount as might be legally refundable, on the ground of special assessment in accordance with Treasury Decision 4266 promulgated by the Commissioner. This last claim for refund was filed and received by the Commissioner six months after he had allowed the overpayment of $28,967.19, although he had not advised the partnership thereof. Notwithstanding this the Commissioner on June 1, 1929, prepared and delivered to the partnership a certificate of overassessment for 1917 which stated a total overassessment and overpayment in favor of the partnership of $28,967.19 but erroneously advised the partnership that payment of $8,316.34 of the balance due was barred. The certificate stated in the footnote thereof the amount of the overpayment refunded plus interest, totaling $34,008.25, for which check was enclosed. No credits whatever were involved, and no claim was made by the Government, and no advice was given the partnership that the Government was entitled to retain the amount of $8,316.34 of the overpayment allowed except on the ground that payment thereof was barred by the statute of limitation, which was not the fact.

Opinion of the Court

In *Shipley Construction & Supply Co.* v. *United States*, 79 C. Cls. 736, 7 Fed. Supp. 492, it appeared that the Commissioner on December 27, 1926, determined an overassessment for 1920 which he advised the taxpayer would be allowed, but thereafter, on July 13, 1927, he advised the taxpayer that the amount could not be refunded because barred by the statute of limitation. Counsel for the defendant contended in the *Shipley* case, as it contends in the case at bar, that there had been no statement of account and no promise, express or implied, to pay the overpayment determined, and that the suit was barred. We held that there had been a statement of overpayment of $8,654.13 in favor of plaintiff for the taxable year 1920 and that the suit, having been instituted within six years thereafter, was not barred, and judgment was rendered in favor of plaintiff. The case at bar is, we think, even stronger in favor of plaintiff than in the *Shipley* case; for here the taxpayer made a demand for a refund on the ground on which the overpayment was determined after payment and also after the Commissioner had formally allowed the overpayment and before he made the mistake of fact in concluding that payment of a portion of it was barred by the statute of limitation. The fact in the case at bar that he mailed a certificate of overassessment showing a computation of the overpayment, a portion of which was refunded, and in the *Shipley* case wrote a letter explaining the details of the matter, and concluded that no portion of the overpayment could be refunded because of the statute of limitation, does not change the situation.

In *Toland* v. *Sprague*, 12 Pet. 300, 335, the court said that "the nature of the account is not changed by there being a controversy as to a balance stated, which the defendant does not ask to diminish, or the plaintiff to increase; * * * the question between them [the parties] is not about the account, or any item in it; but as to the right of the defendant to retain the admitted balance, * * *."

In the case at bar there was no controversy as to the amount due the plaintiff. The Commissioner did not de-

Syllabus

crease the amount of $28,967.19 allowed and the plaintiff did not ask to have it increased. The only controversy was with reference to whether the whole of the balance due could be refunded. As to this plaintiff was right and the defendant was wrong.

The cases of *Stearns Co.* v. *United States*, 291 U. S. 54; *Leisenring, et al., Exrs.* v. *United States*, 78 C. Cls. 171; *First National Bank of Beaver Falls* v. *United States*, 79 C. Cls. 744, 9 F. Supp. 424; and *Pratt & Whitney Co.* v. *United States*, 80 C. Cls. 676, 10 F. Supp. 148, on which counsel for defendant relies, are clearly distinguishable. In those cases no balance was stated in favor of the taxpayer and the certificates of overassessment mailed in each case showed that either the entire overpayment had been credited to taxes for other years or that a portion thereof had been credited and the balance refunded.

Plaintiff is entitled to recover $8,316.34 with interest as provided by law, for which judgment will be entered. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## CINCINNATI MILLING MACHINE COMPANY v. THE UNITED STATES

[No. 42872. Decided May 4, 1936]

*On the Proofs*

*Income tax; double deduction.*—Double deductions from income, like double taxation, should never be presumed, and should always be avoided unless clearly provided by the statutes.

*Same; deduction by parent corporation of losses of subsidiary; statute of limitations.*—Where a parent corporation claimed and was erroneously allowed deductions from income for losses of a subsidiary for prior years, a deduction for loss to the parent corporation resulting from the subsequent liquidation of the subsidiary would amount to a double deduction and is therefore not allowable, and it is immaterial that recovery by the Government for the erroneously allowed deductions is barred by the statute of limitations.

*The Reporter's* statement of the case:

*Mr. A. K. Shipe* for the plaintiff. *Messrs. Esch, Kerr, Taylor & Shipe* were on the brief.

*Mr. J. W. Blalock*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant. *Mr. Assistant Attorney General Frank J. Wideman* was on the brief.

The court made special findings of fact as follows:

1. The Cincinnati Milling Machine Company, the plaintiff herein, is, and during all the time mentioned in its petition, was a corporation organized and existing under and by virtue of the laws of the State of Ohio, with its principal office and place of business in Cincinnati, State of Ohio.

2. In April 1917 the plaintiff purchased the entire common capital stock of the Modern Foundry Company, a corporation, for which it paid a total of $167,738.86.

3. On December 27, 1922, the plaintiff acquired all the outstanding preferred stock of the said Modern Foundry Company, for which it paid in cash a total of $156,800.

4. For the years 1918 to 1927, inclusive, the plaintiff duly filed consolidated income tax returns for the plaintiff and the Modern Foundry Company with the Collector of Internal Revenue at Cincinnati, Ohio.

5. The income or loss of the plaintiff and the Modern Foundry Company, and their consolidated income or loss for the years 1918 to 1927, inclusive, follows:

| | Consolidated | The C. M. M. Co. | Foundry |
|---|---|---|---|
| 1918 | $2,939,577.88 | $2,913,307.35 | $26,270.53 |
| 1919 | 1,156,366.44 | 1,231,205.57 | *74,839.13* |
| 1920 | *31,957.35* | 14,362.17 | *46,319.52* |
| 1921 | *496,798.45* | *371,442.23* | *125,356.22* |
| 1922 | 11,114.26 | 64,598.73 | *53,484.47* |
| 1923 | 506,441.64 | 511,502.37 | *5,060.73* |
| 1924 | 151,869.97 | 167,432.99 | *15,563.02* |
| 1925 | 163,542.88 | 179,919.00 | *16,376.12* |
| 1926 | [1] 965,473.87 | 969,512.23 | *30,411.04* |
| 1927 | [1] 515,876.30 | 320,222.02 | 14,327.41 |

[1] This includes income of Cincinnati Grinders, Inc.

[Italic figures indicate loss.]

**6.** With the knowledge of the Commissioner of Internal Revenue, and pursuant to the procedure followed by the Bureau of Internal Revenue at the time, the plaintiff in arriving at the consolidated income for the years 1922 and 1923, as shown by its tax returns for said years, deducted from its income the losses of its subsidiary, the Modern Foundry Company, for the years 1921 and 1922 as well as the loss of the plaintiff for the year 1921.

**7.** Subsequently by decisions of the courts it has been determined that the losses of a subsidiary company could not be deducted from net income of the parent company in arriving at the consolidated net income for the year, or years, following the loss; and, that the loss of a subsidiary company is deductible in the following year, or years, only from the income of the subsidiary company.

**8.** In December 1927 the plaintiff paid the sum of $550,000 to the Modern Foundry Company for its entire property and assets, which property and assets were thereupon transferred to the plaintiff. Upon receipt of the $550,000, the Modern Foundry Company paid to the plaintiff the sum of $535,000 in liquidation of advances previously made by the plaintiff to that company. The balance of $15,000 was used by the Modern Foundry Company to pay certain of its other debts.

**9.** On December 31, 1927, the Modern Foundry Company had no assets and no liabilities, and on that date its common and preferred stock became worthless.

**10.** The plaintiff received nothing on its investment in the stock of the Modern Foundry Company, but on the contrary suffered a loss of $324,538.86, the cost of the stock. This loss was suffered in 1927, when the stock became worthless. The Commissioner of Internal Revenue reduced this loss by $290,964.83, which amount plaintiff had availed itself of as losses of the subsidiary, Modern Foundry Company, for prior years.

**11.** On March 15, 1928, the plaintiff filed its tentative corporation income tax return for the year 1927, and on or about May 15, 1928, the completed return was filed, both with the Collector of Internal Revenue at Cincinnati, Ohio.

The completed return disclosed a net income of $470,877.73, and a tax liability of $63,568.49. A subsequent examination of the books and records of the plaintiff resulted in the assessment of deficiency in tax and interest by the Commissioner of Internal Revenue of $6,943.25, making a total of tax and interest for the year 1927 of $70,512.51, which the plaintiff duly paid in the following manner:

| | |
|---|---|
| March 15, 1928 | $15, 815. 25 |
| June 13, 1928 | 15, 969. 76 |
| Sept. 13, 1928 | 15, 892. 13 |
| Dec. 13, 1928 | 15, 892. 12 |
| Aug. 28, 1930 | 6, 943. 25 |
| | $70, 512. 51 |

12. On August 7, 1930, the plaintiff filed a properly executed claim for refund of $43,812.76 with the Collector of Internal Revenue at Cincinnati, Ohio, giving as the grounds therefor that plaintiff had sustained a deductible loss during the year 1927 resulting from the liquidation of its wholly owned subsidiary, the Modern Foundry Company.

13. On February 12, 1934, the plaintiff was advised by the Commissioner of Internal Revenue that its claim for refund had been allowed in the amount of $4,532.49, with interest of $647.95, totalling $5,180.44, and had been disallowed for $38,632.32.

14. In the conduct of its business for the years 1921 and 1922 the Modern Foundry Company suffered losses of $125,356.22 and $53,484.47, respectively. For the taxable years 1922 and 1923 the plaintiff reduced its net income by the net losses which the Modern Foundry Company had sustained for the years 1921 and 1922, respectively, which reduction of net income was erroneous. However, the reduction was with the knowledge of the Commissioner of Internal Revenue, consistent with the procedure followed at that time, and was then considered by the plaintiff and the Commissioner of Internal Revenue to be legally correct. By reason of this erroneous reduction in net income the plaintiff's net taxable income for the years 1922 and 1923 was understated to the extent of $178,840.69, an income tax

upon which would have been at that time collectible by the defendant at 12½ per centum, or $22,355.08, had the defendant asserted and prosecuted a deficiency assessment in that amount against the plaintiff.

15. The plaintiff's request for refund is based upon the alleged loss of $324,538.86, which it sustained in 1927, when the stock of the Modern Foundry Company became worthless.

16. The plaintiff availed itself of losses of the Modern Foundry Company to the extent of $178,627.18 in the years 1922 and 1923, such losses having been sustained by the Modern Foundry Company in the conduct of its business in 1921 and 1922.

17. The losses which plaintiff availed itself of, as mentioned in Finding 16 hereof, were unlawful.

18. The time has expired within which the defendant may assert a deficiency in taxes against the plaintiff for the years 1922 and 1923.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff seeks recovery of the sum of $24,114.66, with interest, an alleged overpayment of Federal income taxes for the year 1927.

For the years 1918 to 1927, inclusive, the plaintiff filed consolidated income tax returns for itself and the Modern Foundry Company. Plaintiff, in April 1917, had acquired all the common capital stock of the Modern Foundry Company for which it paid $167,738.86 in cash, and on December 27, 1922, had acquired all the preferred stock of the said company for which it paid $156,800 in cash.

In December 1927 the plaintiff paid the sum of $550,000 to the Modern Foundry Company for its entire property and assets, which property and assets were thereupon transferred to plaintiff. Upon receipt of the $550,000 the Modern Foundry Company paid plaintiff the sum of $535,000 in liquidation of advances previously made by plaintiff to that company, the

balance, $15,000, was used by the Modern Foundry Company in the payment of certain other debts. Thereupon the Modern Foundry Company had neither assets nor liabilities and its entire stock, both common and preferred, became worthless. The plaintiff upon the liquidation of the Modern Foundry Company received nothing on its investment of $324,538.86 in the stock of that company.

The plaintiff filed its completed corporation income tax return for the year 1927 on May 15, 1928, which return disclosed a net income of $470,877.73, and a tax liability of $63,568.49, which was duly paid. Subsequently the Commissioner made an additional assessment for the year of $6,943.25, which amount was also paid. Plaintiff in the return made no claim for a deduction from income because of the loss resulting from the liquidation in 1927 of its wholly owned subsidiary, but subsequently on August 7, 1930, filed its claim for refund of $43,812.76 on the ground that it had sustained a loss of $324,538.86 on the liquidation of the stock of that company. The Commissioner of Internal Revenue upon consideration of the claim for refund, among other adjustments, reduced plaintiff's loss of $324,538.86 to a deductible loss of $33,574.03 and refused to allow as a deduction the balance of the stock loss in the sum of $290,964.83 on the ground that the plaintiff had availed itself of this sum in the consolidated returns as an offset to its income during certain prior years, which losses could not have been availed of by the Modern Foundry Company as net losses or otherwise had its income been reported in separate returns instead of being reported in a consolidated return.

The plaintiff in this proceeding challenges the propriety of the Commissioner's action in reducing the amount of its loss on account of the liquidation of the stock of the Modern Foundry Company to the extent of $178,840.69, which sum represents the net losses of that company for the years 1921 and 1922. These losses were used by plaintiff in the consolidated returns to reduce its taxable income for the years 1922 and 1923. The deductions were acquiesced in by the Commissioner and were consistent with the proce-

dure then followed by the Bureau of Internal Revenue. The deductions, however, under the authority of *Woolford Realty Co., Inc.*, v. *Rose*, 286 U. S. 319, are conceded to have been unlawfully made, although at the time they were taken both the plaintiff and the Commissioner of Internal Revenue deemed them to be legally correct. By reason of these erroneous deductions the plaintiff's net taxable income for the years 1922 and 1923 was understated to the extent of $178,840.69, the income tax upon which at the time would have been $22,355.08.

The plaintiff contends that the reduction of its otherwise deductible loss for the year 1927 to the extent of $187,627.18, because losses of the Modern Foundry Company in a like amount during the years 1921 and 1922 were unlawfully deducted from plaintiff's income for 1922 and 1923, would in effect extend the period of limitation for the assessment of deficiency taxes due from the plaintiff for those years far beyond that provided by law, thus enabling the Commissioner to collect from the plaintiff deficiency taxes never assessed against it and clearly barred by the statute. It is contended that because the deductions from plaintiff's income for the years 1922 and 1923 of losses of the Foundry Company in the amount of $187,627.18 were illegally taken, the plaintiff, in contemplation of law, did not avail itself of such losses, and that the Commissioner was without authority to reduce plaintiff's 1927 loss on the stock of the Foundry Company by deducting the amount of the net losses of that company for the years 1921 and 1922, which plaintiff had unlawfully availed itself of in arriving at the consolidated net income for the years 1922 and 1923.

Section 202 of the Revenue Act of 1926 provides, in part, as follows:

SEC. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

(b) In computing the amount of gain or loss under subdivision (a)—

(1) Proper adjustment shall be made for any expenditure or item of loss properly chargeable to capital account, and

*     *     *     *     *

It is well established that double deductions like double taxation should never be presumed and should always be avoided unless clearly provided by the statute. *Eisner* v. *Macomber*, 252 U. S. 189; *Irwin* v. *Gavit*, 268 U. S. 161; *United States* v. *Ludey*, 274 U. S. 295.

Upon the basis of these decisions, the General Counsel of the Bureau of Internal Revenue (G. C. M., 7765, Cumulative Bulletin IX–I, p. 223) placed the following construction on section 202 (b) (1) of the Revenue Act of 1926:

> * * * that an adjustment to the gain or loss basis of a subsidiary corporation's stock in the hands of the parent corporation is necessary where the losses of the subsidiary are reported in a consolidated return and used as an offset against the income of the parent corporation and it appears that the losses could not have been availed of by the subsidiary as net losses or otherwise had its income been reported in separate returns instead of being reported in a consolidated return.

This ruling was followed by the Commissioner of Internal Revenue in reducing the loss sustained by plaintiff on the liquidation of the stock of the Modern Foundry Company to the extent of the net losses of that company which had been taken by plaintiff in previous years in its consolidated tax returns.

In *McLaughlin, Collector*, v. *Pacific Lumber Co.*, 293 U. S. 351, the taxpayer sought a reduction in income for the year 1923 on account of losses resulting from the liquidation within the year of a wholly owned subsidiary, A. F. Thane & Company. From 1920 to 1923, inclusive, the taxpayer and Thane & Company had made separate income tax returns and also consolidated returns as affiliated corporations. Their income taxes were assessed and paid on the latter basis. The taxpayer in each of the years had a large net income and Thane & Company lost heavily. The net losses of Thane & Company during each of the years were deducted from the income of the taxpayer in arriving at

the consolidated net income and during the years involved the deductions so made were in excess of the taxpayer's loss resulting from the liquidation of Thane & Company. In deciding the question presented the court said:

> If not inconsistent with its obligation under the statute accurately to report taxable income for 1923, respondent may deduct the losses it sustained in that year as the result of its investment in the stock of Thane & Company and its advances to or for that company. *Burnet* v. *Aluminum Goods Co.*, 287 U. S. 544, 550. But a consolidated return must truly reflect taxable income of the unitary business, and consequently it may not be employed to enable the taxpayer to use more than once the same losses for reduction of income. Losses of Thane & Company that were subtracted from respondent's income are not directly or indirectly again deductible. *Handy & Harman* v. *Burnet*, 284 U. S. 136, 140. *United States* v. *Ludey*, 274 U. S. 295, 301. *Ilfeld Co.* v. *Hernandez*, 292 U. S. 62, 68.

In *Ilfeld Co.* v. *Hernandez*, 292 U. S. 62, the court said:

> The question is whether petitioner is entitled to deduct from its 1929 income any part of the losses resulting from its investments in the subsidiaries.
>
> * * * * *
>
> The allowance claimed would permit petitioner twice to use the subsidiaries' losses for the reduction of its taxable income. By means of the consolidated returns in earlier years it was enabled to deduct them. And now it claims for 1929 deductions for diminution of assets resulting from the same losses. If allowed, this would be the practical equivalent of double deduction. In the absence of a provision of the Act definitely requiring it, a purpose so opposed to precedent and equality of treatment of taxpayers will not be attributed to lawmakers.

The plaintiff in the brief concedes that the facts in the *McLaughlin case* are quite similar to those presented here but says that the question of unlawful deductions of losses of an affiliated corporation from the income of the parent corporation, in arriving at consolidated net income, was not there involved, and hence the decision is not authority in

support of the Commissioner's action in the instant case. This contention, we think, is without merit. There is no contention that the plaintiff did not receive the full benefit of the deductions from its income of the losses of the Modern Foundry Company for the years prior to 1927. It is simply contended that these benefits were unlawfully received. The plaintiff asked for the deductions and through a mistaken interpretation of the law they were allowed. It has had the benefit of them in the reduction of its taxes for the years involved. To now allow the plaintiff a reduction in income for the year 1927 of the full amount of the loss sustained by it during the year on the liquidation of the Modern Foundry Company, would, to the extent of the $187,-840.69 disallowed by the Commissioner, amount to a double deduction of the same losses. This the law does not permit, and it is entirely immaterial whether the deductions taken in 1922 and 1923 were legal or illegal when taken. The material question is whether they were in fact taken. If so the same losses may not again be deducted.

The plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice,* concur.

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## CENTRAL HANOVER BANK & TRUST CO., TRUSTEE FOR LILLIA BABBITT HYDE, UNDER WILL OF REBECCA BABBITT, v. THE UNITED STATES

[No. 42951. Decided May 4, 1936]

*On the Proofs*

*Income tax; profit on sale of tax-exempt Government bonds.*—A tax on the profit derived from the purchase and sale of United States Liberty Bonds was not a tax upon the bonds, and therefore does not violate the statutory exemption of such bonds from all taxation except Federal estate or inheritance taxes.

*The Reporter's* statement of the case:

*Mr. John E. Hughes* for the plaintiff. *Mr. William Cogger* was on the brief.

*Mr. George H. Foster*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

During 1931 plaintiff, as trustee, sold certain United States First Liberty Loan 3½% bonds issued June 15, 1917, at a profit of $61,275.53 in excess of the cost of such bonds. A tax of $7,372.03 computed on such profit was paid. A claim for refund of $5,529.62 of such tax was filed. The first installment paid on March 15, 1932, was not included in this claim for the reason that it was barred at the time the claim was filed in 1934. Judgment is asked for the last-mentioned amount on the grounds, first, that the principal or par value of the bonds, amounting to $687,000, was exempt from tax under section 1 of the Act of April 24, 1917, 40 Stat. 35, and, second, that if the profit from the sale of such bonds was not exempted from taxation by the statute mentioned, the amount claimed should be refunded for the reason that Congress was without power to tax the bonds of the United States.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

Central Hanover Bank & Trust Company was duly appointed and, at all times hereinafter mentioned, the duly acting trustee for Lillia Babbitt Hyde under the last will and testament of Rebecca Babbitt.

Plaintiff, as trustee, filed on March 15, 1932, an income tax return for 1931 showing a net income of $61,275.53 and a tax of $7,372.03 which was paid in equal quarterly installments on March 15, June 15, September 15, and December 15, 1932.

The net income reported in this return was a profit resulting from the sale of $687,000 par value First Liberty Loan 3½% bonds due in 1947 and issued June 15, 1917. These bonds were purchased by plaintiff in 1920 at a cost of $637,515.74, the then market price in the open market, and were sold by plaintiff in 1931 for the price of $698,791.27. Neither the purchase nor the sale of these bonds was made from or to the United States. The bonds were issued by the defendant

at par to be redeemed at par with accrued interest on and after June 15, 1932, pursuant to an act of Congress of April 24, 1917. The Secretary of the Treasury, on April 22, 1935, called the bonds for redemption on June 15, 1935.

May 16, 1934, plaintiff duly filed a claim for refund of $5,529.62 for 1931. This claim was rejected April 12, 1935.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

During 1920 plaintiff, as trustee, purchased in the open market at a cost of $637,515.74 certain First Liberty Loan bonds of the par value of $687,000. The purchase price represented the then market value of the bonds. In 1931 these bonds were sold for $698,791.27, resulting in a profit of $61,275.53 from the purchase and sale. This profit was reported in the income-tax return filed for 1931 and an income tax computed thereon in accordance with the revenue act then in force was paid. The act of April 24, 1917, 40 Stat. 35, authorizing the issuance of these bonds provided in part as follows: "The principal and interest thereof shall be payable in United States gold coin of the present standard of value and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any State or local taxing authority."

The first contention of plaintiff is that a tax on the profit from the sale of the bonds is a tax upon the principal of the bonds and violates the exemption clause of the statute quoted above. We are of opinion that a tax exacted on the profit from a sale was not a tax upon the principal of the bonds, and the income tax here involved was, therefore, legally collected. This question, it seems to us, was put at rest by the decision in *Willcuts* v. *Bunn*, 282 U. S. 216, which involved the right of the Federal Government to tax the profit from the purchase and sale of municipal bonds. In that case it was contended that the tax was illegally exacted for the reason that a tax on such profit was a tax on the bond which the Federal Government was without power to impose. The court distinguished between a tax on the prin-

cipal and interest of a bond and a tax on the gain from the purchase and sale thereof. At pages 227 and 228 the court said:

> But it does not follow, because a tax on the interest payable on state and municipal bonds is a tax on the bonds and therefore forbidden, that the Congress cannot impose a nondiscriminatory excise tax upon the profits derived from the sale of such bonds. The sale of the bonds by their owners, after they have been issued by the State or municipality, is a transaction distinct from the contracts made by the government in the bonds themselves, and the profits on such sales are in a different category of income from that of the interest payable on the bonds. Because the tax in question is described as an "income tax" and the profits on sales are included in "income", the distinction is not lost between the nature of a tax applied to interest and that of a tax applied to gains from sales. The federal income-tax acts cover taxes of different sorts. *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1, 17; *Stanton* v. *Baltic Mining Company*, 240 U. S. 103, 114. The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transaction on his part. The tax falls upon the owner by virtue of the mere fact of ownership, regardless of use or disposition of the security. The tax upon profits made upon purchases and sales is an excise upon the result of the combination of several factors, including capital investment and, quite generally, some measure of sagacity; the gain may be regarded as "the creation of capital, industry, and skill." *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 531.

See, also, *Marland* v. *United States*, 78 C. Cls. 69, in which this court held that while the income from leases of state-owned school lands was exempt from Federal taxation, the profit made from the sale of such leases was taxable; and *De Stuers* v. *Commissioner*, 26 B. T. A. 201, in which it was held that where Second Liberty Loan bonds containing an exemption clause similar to the one involved in this case were purchased below par and sold at a profit, such profit was taxable.

What has been said above disposes also of plaintiff's contention that the United States has no power to tax its own

bonds. If a tax on the profit derived from the purchase and sale of municipal bonds did not constitute a tax on the bonds as was held in *Willcuts* v. *Bunn*, *supra*, we fail to see how the income tax involved in the case at bar can be said to be a tax by the United States on its own bonds. It is therefore unnecessary to discuss the second question raised by the plaintiff.

The plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## McSHAIN COMPANY, INC., v. THE UNITED STATES

[No. 43085. Decided May 4, 1936]

*On the Proofs*

*Contract for construction work on Library of Congress Annex; finality of contracting officer's findings as to delay.*—Where a Government contract provided that the findings of the contracting officer as to the cause and extent of delay by the contractor in the performance of the contract should be final and conclusive, neither the Comptroller General nor the courts can, in the absence of fraud or bad faith, go behind the decision, or findings, of the contracting officer.

*The Reporter's* statement of the case:

*Mr. Prentice E. Edrington* for the plaintiff.

*Mr. C. Keefe Hurley*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal office in the City of Philadelphia.

2. On January 3, 1934, plaintiff entered into a written contract with the defendant, which was represented by David Lynn, Architect of the Capitol, as contracting officer. Under the provisions of said contract, plaintiff agreed

to excavate for and construct the foundations, foundation walls, columns, floor construction, etc., for an Annex to the Library of Congress, in the District of Columbia, in consideration whereof plaintiff was to receive $372,287. The contract and accompanying specifications are of record as plaintiff's Exhibit 2, and are by reference hereby made a part of this finding.

3. The contract provided that plaintiff should commence work within five days after receiving notice to proceed, and the work should be completed within 245 calendar days. On February 1, 1934, plaintiff received the notice to proceed and completion of the contract was required on or before October 4, 1934.

4. Article 9 of the contract provided:

> ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers, and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or

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negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

**5.** Plaintiff actually completed the contract to the satisfaction of defendant on March 6, 1935, after an actual delay of 153 calendar days beyond the fixed date for completion, as provided in the contract.

**6.** Plaintiff, at various times during the construction, made requests for extensions of time, which amounted to a total of 170½ days. The requests for such extensions were as follows:

| | |
|---|---|
| 1. April 8, 1934, to April 11, 1934, delay caused by deference of work while this office investigated underlying soil conditions on footings known as Nos. 15 to 20, inclusive | 3 calendar days. |
| 2. May 1, 1934, to July 8, 1934, delay caused by carpenters' strike | 69 calendar days. |
| 3. August 27, 1934, to November 2, 1934, delay caused by loss of two hours per day on each of 76 working days during this period, due to the structural steel and iron-workers' union shortening the working day for their workers, from eight to six hours per day | 27 calendar days. |
| 4. September 7, 12, 13, and 21st, 1934, delay caused by abnormal weather conditions | 4 calendar days. |
| 5. October 2, 1934, delay caused by general union strike due to another contractor on the project employing non-union men | ½ calendar day. |
| 6. February 1934 to November 1934, general delay in the contract operations caused by various changes and modifications in the original contract which affected the contract as a whole | 45 calendar days. |

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| | |
|---|---|
| 7. December 1934 and January and February 1935, delay caused by deference of part of the contract work until winter weather, which was originally due for performance during the milder seasons, the deference having been caused by delays for which the contractor is not considered responsible | 22 calendar days. |
| Total | 170½ calendar days. |

7. After investigating the causes and extent of the delays, the contracting officer found, as a fact, that plaintiff had been unavoidably delayed by unforeseen events beyond plaintiff's control, and without any fault or negligence on its part, for a period of 170½ days, as set forth in Finding 6 hereof. He also found that plaintiff had completed its contract within 153 calendar days after the contract was due for completion, which was 17½ calendar days less than the period which it had been delayed. The contracting officer, in forwarding a voucher in the sum of $32,-304.69, for final settlement recommended that all liquidated damages be waived.

8. The Comptroller General decided the contracting officer was without authority to excuse plaintiff for the period of 27 calendar days' (item 3, Finding 6) delay, occasioned by the refusal of the steel workers to work full eight-hour days. This reduced the calendar days of excusable delay to 143½, and the Comptroller General accordingly held that plaintiff was 9½ days late in completing its contract. Assessing liquidated damages at the rate of $175 per day for the 9½ days, the Comptroller General deducted the sum of $1,662.50 from the sum of $32,304.69, and forwarded plaintiff a check in the amount of $30,642.19.

9. Plaintiff, on receipt of the check in the sum of $30,642.19, and under date of June 7, 1935, wrote the Comptroller General, as follows:

> There has been received your certificate of settlement and Treasury check to our order in the sum of $30,642.19 purporting to be in final payment of all sums due to us as contractors for the execution of Contract ACcong-126, for excavation for and construction of foundations, foundation walls, columns, floor con-

Opinion of the Court

> struction, etc., for the Annex to the Library of Congress, Washington, D. C.
>
> It is noted that you have disallowed the recommendations and decision of the contracting officer that we be allowed an extension of time involved in the delays occasioned without our fault or neglect, as a result of the steel workers' refusal to work more than six hours in a day, and as a consequence of this decision on your part you have determined that the completion of the contract was delayed nine and one-half (9½) days and have assessed as liquidated damages at $175.00 per day, or a total sum of $1,662.50, which amount has been withheld from us in your final settlement.
>
> You are respectfully but formally notified that your action in disallowing the decision and recommendation of the contracting officer is hereby protested, and all of our rights are hereby reserved to sue in the Court of Claims for the sum illegally disallowed by your office.
>
> The check sent us is being deposited under protest and with full reservation of our rights to make claim for the sum deducted by your office.

The court decided that plaintiff was entitled to recover.

Whaley, *Judge*, delivered the opinion of the Court:

The contract in this case provided that the contracting officer should ascertain the facts and the extent of the causes of delay and his findings of facts "shall be final and conclusive." The contracting officer was the architect of the capitol and he did make a finding of fact that the contractor had been unavoidably delayed by unforeseen events beyond his control and without fault or negligence. The Comptroller General subsequently decided that the contractor was liable for 9½ days' delay and deducted liquidated damages in the sum of $1,662.50. Neither fraud nor bad faith is alleged or proven. This court and the Supreme Court by numerous decisions have held there is no going behind the decision of the contracting officer when the contract provides that "his finding of facts therein shall be final and conclusive on the parties thereto." The action of the Comptroller General was without legal authority. *Kihlberg* v. *United States*, 97 U. S. 398; *United States* v. *Gleason*, 175 U. S. 588; *Sun Shipbuilding & Dry Dock Co.*,

76 C. Cls. 154; *Penn Bridge Co.* v. *United States*, 59 C. Cls. 892; *Carroll* v. *United States*, 76 C. Cls. 103, where all the cases are fully reviewed; *Albina Marine Iron Works Inc.* v. *United States*, 79 C. Cls. 714.

The plaintiff is entitled to recover the sum of $1,662.50. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## MAX SHOOLMAN v. THE UNITED STATES

[No. 43143. Decided May 4, 1936]

*On Demurrer to Petition*

*Proceedings for condemnation of private property for public use; abandonment of proceedings; damage resulting from proceedings; damnum abseque injuria.*—It is well settled that the United States has the legal right to abandon or dismiss condemnation proceedings at any time before making payment for and taking possession of the property involved in such proceedings, and that where this course is pursued any resulting damage sustained by the owner during the pendency of the proceedings is consequential and not recoverable in an action against the Government.

*The Reporter's* statement of the case:

*Mr. Meyer J. Sawyer* for the plaintiff.

*Mr. P. M. Cox*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The averments of the petition sufficiently appear from the court's opinion.

WILLIAMS, *Judge*, delivered the opinion of the court:

The petition alleges in substance that plaintiff is the owner of a certain lot or tract of land with buildings thereon situated in Highgate, State of Vermont, and located on or contiguous to the international boundary line between the United States and Canada; that in October 1931 plaintiff was requested to submit a proposal for the said lot to the Bureau of Customs, and a proposal was made by letter

addressed to the Assistant Secretary of the Treasury; that said lot was to be used as a Customs Inspection Station at Swanton, Vermont; that in 1932 Congress appropriated $54,000.00 for the building of an inspection station at the above location; that thereafter the Treasury Department authorized the Attorney General to acquire said lot by condemnation proceedings; that the price of the lot was not agreed upon, and by mutual consent of the parties it was agreed that the Federal Judge appoint three commissioners to set a fair price for the lot; that after hearings upon the matter the Commissioners made an award to petitioner for $27,000.00; that subsequently a judgment and an order for confirmation for said amount was entered of record, on January 24, 1933, upon the motion of the United States Attorney; that during said period, to wit, October 29, 1931, to January 24, 1933, petitioner was unable to sell, lease, or otherwise dispose of said lot to anyone; that after January 24, 1933, the Court was requested to vacate the judgment entered as aforesaid and the United States "abandoned the site for an inspection station"; that by reason of said action by the United States, which was objected to by plaintiff, the plaintiff has suffered a severe loss. Damages against the United States are prayed in an unnamed sum.

The defendant by the demurrer admits the truth of the facts averred in the petition but says that they do not state a cause of action against the United States within the jurisdiction of the court. We think the demurrer is well taken. It is not alleged that the United States made entry on the property during the period involved, or in any way disturbed the plaintiff in the occupancy of it. The damages claimed arise from the alleged inability of the plaintiff to sell, lease, or otherwise dispose of his lot during the period from October 29, 1931, when the plaintiff was requested to submit a proposal for the sale of the lot to the defendant, until January 24, 1933, or shortly thereafter, when the condemnation proceedings instituted by the Government were abandoned and the judgment theretofore entered making an award to the plaintiff for $27,000 was vacated.

The law is well settled that the United States has the legal right to abandon or dismiss condemnation proceedings

at any time before making payment for and taking possession of the property involved in such proceedings. It is also well settled that where such proceedings are instituted by the United States and subsequently abandoned or dismissed, any damages that might have been sustained by the owner during the pendency of the proceedings are consequential and are not recoverable in an action against the United States. In *Kanakanui et al.* v. *United States*, 244 Fed. 923, the court said:

> The United States had the right to and did abandon the proceeding. The complaint in the present action clearly shows that the plaintiffs suffered substantial damage by reason of the action of the defendant * * *. * * * If, as an incident to the right which the United States properly exercised to condemn property to a public use in a proceeding which was subsequently abandoned, the defendants were required to incur expenses, or were incidentally injured, it was a case of *damnum abseque injuria*, and comes within—
> "the universally recognized principle of law which exempts from liability for loss or damage incidentally resulting from the proper exercise of a legal right." * * *

The demurrer is sustained, and accordingly the petition is dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## KARL J. KRUEGER v. THE UNITED STATES

[No. 43145. Decided May 4, 1936]

*On Demurrer to Petition*

*Salary of discharged Government employee; title to office; jurisdiction.*—The Court of Claims has no jurisdiction to try title to office; and where a Government employee appointed to a position in the unclassified service at a specified annual salary, which was paid him for the term of his actual service, was discharged after a few months' service and a successor appointed to the position, a claim by him for the balance of a year's salary is not within the jurisdiction of the court.

*The Reporter's* statement of the case:

*Mr. Carroll Dunscombe* for the plaintiff.

*Messrs. Paul A. Sweeney* and *Henry A. Julicher*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The material facts alleged in the petition appear in the opinion of the court.

*Per Curiam:* The facts alleged in the petition show that the plaintiff was appointed a representative of the United States Reemployment Service for Martin County, Florida, at an annual salary of $1,440; and that after serving a few months the plaintiff was removed or discharged from office and someone else was appointed to fill the position formerly occupied by him. The position was not in the classified service. The plaintiff was paid for the period he served. This suit is brought for the recovery of the salary for the remainder of the year. The defendant has demurred to the petition on the ground that this court has no jurisdiction. It has been held repeatedly by this court that it has no jurisdiction to try the title to office. The plaintiff should have brought his suit in a court of competent jurisdiction to try his right to the office. See *Goodwin* v. *United States*, 76 C. Cls. 218 and cases reviewed. The demurrer is sustained and the petition dismissed. It is so ordered.

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## JOHN K. M. BARRY v. THE UNITED STATES

[No. 43215. Decided May 4, 1936]

### *On Defendant's Motion to Dismiss Petition*

*Salary of discharged Government employee; title to office; jurisdiction.*—The Court of Claims has no jurisdiction to try title to office, and is, therefore, without jurisdiction of a claim of a discharged Government employee for salary dependent upon his having title to the office to which the salary was attached.

Opinion of the Court

*Cause of action; compensation for governmental suggestions and information; contract.*—Where plaintiff's petition fails to allege or show a contract, express or implied, for compensation by the Government for alleged furnishing of governmental suggestions and information by plaintiff to Government officials, the petition fails to state a cause of action against the Government on account of the furnishing of such suggestions and information by plaintiff.

*Jurisdiction; claims of discharged Government employee for resultant loss of property, for reinstatement, and for clearing of record.*—The Court of Claims has no jurisdiction of claims or suit for restoration of a discharged Government employee to his former position, for the clearing of such an employee's record of false charges or stigma, or for loss of property by such an employee due to his inability to secure employment after dismissal from the Government service.

*The Reporter's* statement of the case:

*Mr. John K. M. Barry, pro se.*

*Mr. J. Robert Anderson*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The averments of the petition sufficiently appear from the court's opinion.

WHALEY, *Judge*, delivered the opinion of the court.

The plaintiff brings this suit to recover the salary of a position in the Government from which he was dismissed; for the clearing of his record; restoration to his former position; reimbursement for certain equities in real property, and compensation for suggestions made to high officials of the Government.

The allegations of the petition show the plaintiff was employed as an auditor and accountant in the Income Tax Bureau at an annual salary of $3,400; that charges in writing were filed against and served upon him and that he filed a written reply thereto; that upon consideration of the charges and answer the plaintiff was dismissed from the service for insubordination, disrespect, and abuse to a superior officer of the Bureau.

For the sake of clarity this may be designated as plaintiff's first cause of action.

It has been repeatedly held that this court has no jurisdiction to try the title to office. The employee's remedy is in a court of competent jurisdiction to try the right to the office and an unreasonable delay in bringing such a proceeding constitutes laches. *Goodwin* v. *United States*, 76 C. Cls. 218 and cases cited.

The second cause of action alleges that during plaintiff's service in the Bureau he sent to high officials, over the heads of his superior officers, certain suggestions in writing and that these suggestions were adopted and put into effect and, as a result thereof, the country at large was made prosperous by billions of dollars and that the reasonable value of these suggestions is ten million dollars. These suggestions were conceived and conveyed during his tenure of office. There is no breach of the copyright law alleged. There is no allegation of any agreement express or implied for payment. The plaintiff has received his salary in full to the date of his discharge from the service of the Government.

The petition fails to allege a cause of action within the jurisdiction conferred on this court by Sec. 250, Title 28 of the United States Code, Sec. 145 of the Judicial Code.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## UNITED STATES GEAR CORPORATION v. THE UNITED STATES

[No. H-455. Decided June 1, 1936]

*On the Proofs*

*Excise tax; automobile gears.*—Transmission gears primarily adapted for use in motor vehicles were taxable under the Revenue Acts of 1918, 1921, and 1924, notwithstanding their also being capable of other uses. The case of *Frost Gear & Forge Co.* v. *United States* differentiated.

*The Reporter's* statement of the case:

*Mr. George M. Morris* for the plaintiff. *Morris, Kix-Miller & Baar*, and *Bisbee, McKone, Wilson, King & Kendall* were on the briefs.

*Mr. James A. Cosgrove*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

The court made special findings of fact as follows:

**1.** Plaintiff is a corporation of the State of Michigan, with its principal place of business located at Jackson therein, and during the times hereinafter mentioned was engaged in the business of manufacturing and selling gears, which it sold exclusively to the American Gear Company, later referred to.

**2.** For the period September 1920 to November 1922, the taxes hereinafter referred to were paid by the American Gear Company. Thereafter, upon the advice and suggestion of defendant's revenue officers, they were paid by the plaintiff.

**3.** The American Gear Company filed monthly manufacturer's excise-tax returns on gears manufactured and sold to it by plaintiff, for the period September 1920 to November 1922, both inclusive, and the amounts of tax shown thereon were assessed by the Commissioner of Internal Revenue and paid by the American Gear Co., for the months, on the dates, and in the amounts following:

| Month | Date of payment | Amount |
|---|---|---|
| September–December 1920 | March 3, 1921 | $881.13 |
| January 1921 | March 14, 1921 | 277.28 |
| February 1921 | April 19, 1921 | 317.88 |
| March 1921 | April 29, 1921 | 391.16 |
| April 1921 | June 6, 1921 | 221.70 |
| May 1921 | July 11, 1921 | 213.46 |
| June 1921 | August 9, 1921 | 521.56 |
| July 1921 | August 27, 1921 | 743.37 |
| August 1921 | September 29, 1921 | 783.73 |
| September 1921 | October 27, 1921 | 570.88 |
| October 1921 | November 30, 1921 | 388.39 |
| November 1921 | January 4, 1922 | 367.75 |
| December 1921 | January 31, 1922 | 484.75 |
| January 1922 | February 28, 1922 | 415.51 |
| February 1922 | March 31, 1922 | 491.36 |
| March 1922 | April 29, 1922 | 386.90 |
| April 1922 | June 10, 1922 | 476.25 |
| May 1922 | July 6, 1922 | 520.65 |
| June 1922 | August 3, 1922 | 534.60 |
| July 1922 | August 31, 1922 | 528.74 |
| August 1922 | September 28, 1922 | 585.85 |
| September 1922 | November 9, 1922 | 800.47 |
| October 1922 | December 6, 1922 | 556.66 |
| November 1922 | December 19, 1922 | 526.93 |
| Total | | 11,986.96 |

4. Plaintiff filed monthly manufacturer's excise tax returns for the period December 1922 to February 1926, both inclusive, and the amounts of tax shown thereon were assessed by the Commissioner and paid by the plaintiff, for the months, on the dates, and in the amounts following:

| Month | Date of payment | Amount |
|---|---|---|
| December 1922 | February 7, 1923 | $438.92 |
| February 1923 | May 8, 1923 | 413.12 |
| March 1923 | April 5, 1923 | 36.16 |
| March 1923 | May 3, 1923 | 830.99 |
| April 1923 | June 1, 1923 | 387.37 |
| May 1923 | June 29, 1923 | 281.45 |
| June 1923 | July 27, 1923 | 646.68 |
| July 1923 | August 28, 1923 | 209.90 |
| August 1923 | September 27, 1923 | 701.02 |
| September 1923 | October 23, 1923 | 549.73 |
| October 1923 | November 22, 1923 | 769.11 |
| November 1923 | December 22, 1923 | 383.75 |
| December 1923 | January 25, 1924 | 493.20 |
| January 1924 | February 26, 1924 | 529.46 |
| February 1924 | March 26, 1924 | 658.23 |
| March 1924 | April 24, 1924 | 425.68 |
| April 1924 | May 24, 1924 | 506.21 |
| May 1924 | June 26, 1924 | 771.37 |
| June 1924 | July 26, 1924 | 697.10 |
| July 1924 | August 20, 1924 | 270.91 |
| August 1924 | September 27, 1924 | 306.51 |
| September 1924 | October 24, 1924 | 245.71 |
| October 1924 | November 29, 1924 | 266.32 |
| November 1924 | December 30, 1924 | 237.27 |
| December 1924 | January 28, 1925 | 364.52 |
| January 1925 | February 28, 1925 | 270.08 |
| February 1925 | March 30, 1925 | 198.89 |
| March 1925 | April 30, 1925 | 309.85 |
| April 1925 | May 29, 1925 | 215.89 |
| May 1925 | June 30, 1925 | 330.11 |
| June 1925 | July 30, 1925 | 229.94 |
| July 1925 | August 28, 1925 | 283.41 |
| August 1925 | September 30, 1925 | 345.73 |
| September 1925 | October 31, 1925 | 217.83 |
| October 1925 | November 30, 1925 | 267.56 |
| November 1925 | December 30, 1925 | 265.03 |
| December 1925 | January 30, 1926 | 297.46 |
| January 1926 | March 5, 1926 | 181.02 |
| February 1926 | April 1, 1926 | 235.50 |
| Total | | 15,068.99 |

5. On February 20, 1925, plaintiff filed a claim for refund of the tax paid on gears for the period September 1920 to February 1923, both inclusive, in the amount of $13,127.85, which was duly rejected by the Commissioner September 6, 1927. The grounds for refund were stated by plaintiff in the claim as follows: "The products manufactured and sold by this company do not come within the provisions of the law levying an excise tax on the receipts in the sale of such products; these products are not parts of an automobile, but were known and used long before the automobile came into existence and are now used for other purposes."

This claim was entitled "U. S. Gear Corporation (paid under name of 'American Gear Company')."

**6.** On March 2, 1925, plaintiff filed its claim for refund of the tax paid on gears for the period March 1923 to December 1924, both inclusive, in the amount of $10,579.30, which was duly rejected by the Commissioner November 16, 1925. This claim repeated the grounds stated in the preceding claim.

**7.** On May 28, 1927, plaintiff filed its claim for refund of the tax paid on gears for the period January 1925 to February 1926, both inclusive, in the amount of $2,705.55, which was duly rejected by the Commissioner August 1, 1927. The grounds stated in the claim were the same as in the two preceding claims with the following added: "The gears taxed can be installed only by a skilled mechanic, especially trained for the purpose and each such installation requires special fitting and possible alterations before use."

**8.** The functioning of gears was well known and old in the art long before the advent of the automobile. Gears had been used for many purposes in mechanisms of all kinds. The gear principle was adaptable to the automotive industry and gears are an indispensable element in the transmission of automotive power. The mechanical principle involved in the operation of gears has not changed. The form and inherent qualities of gear construction have varied in many respects. A gear to operate efficiently must be adapted to the mechanism in which it is installed.

**9.** A differential gear is a mechanical device for connecting two shafts lying in the same axial line so that the device ordinarily acts as a coupling, but at the same time permits one shaft, under certain conditions, to be accelerated or retarded with reference to the action or movement of the other. Differential gears were in use for the purposes mentioned prior to the advent of the automobile.

A pinion gear is the smaller of any two mated gears and may be either the driving or the driven member. Pinion gears were in use in types of machinery where any difference in the size of gears was required, and adapted for use prior to the advent of the automobile.

A ring gear is a ring on which there are teeth cut or cast either externally or internally. The usual reason for making

them in the form of a ring is to save machining and make replacement easier. Prior to the advent of the automobile ring gears were used for the purposes mentioned.

A transmission gear is designed for the transmission of power from one shaft to another, sometimes with the same speed and sometimes for increasing or decreasing speed. Transmission gears were in use for the purposes mentioned in mechanisms adapted for such use prior to the advent of the automobile.

The excise taxes paid as aforesaid, for the recovery of which suit is brought, were upon differential, pinion, ring, and transmission gears manufactured by plaintiff and sold to its parent corporation for resale as replacement parts in the transmission and differential assemblies of standard makes and models of automobiles. Each of the gears so sold bore the identifying number supplied by the parent corporation, which number was used in the advertising of the gear for sale as a replacement part for a particular make or makes and models of standard automobiles.

**10.** The American Gear Co. was a jobber. It owned 97 percent of the corporate stock of plaintiff. The taxes paid by the American Gear Co. were charged by plaintiff thereto on its invoices and the charge so made was satisfied by the American Gear Company's payment to the tax collector.

Plaintiff sold its gears on samples, or on blue prints, or, in the case of repeat orders, on the customer's part number. Such samples, blue prints, or part numbers were furnished plaintiff by the jobber.

None of the orders, invoices, samples, blue prints, or the gears themselves, were designated with the make of a motor vehicle or any other mechanism in which they were to be used. The gears involved did have forged into them an identifying number, and the catalogue of the American Gear Company which listed them for sale contained the name of an automobile so that a purchaser desiring a replacement gear for a certain automobile could obtain the same by reference to the number forged into the gear and the name of the automobile wherein it was to be used. For example, under the title "Buick", the catalogue lists in thirty-three instances available gears for Buick automobiles of every make from the year 1912 to 1925, so that one wishing to purchase

a ring gear for a 1923 Buick had simply to order by stating "Buick 1923—X92–53–14—$12.75."

**11.** Original orders for gears were sometimes accepted upon blue prints, and sales were made by samples. What are called repeat orders were filled by reference to forged numbers on the gears and corresponding numbers in the catalogue, and a purchaser had the opportunity of catalogue purchases as set forth in Finding 10. Plaintiff sold other gears for a variety of purposes. An automobile gear is one which may be adapted to any mechanism specially designed for the use of this particular type of gear. Motor vehicles by reason of the mechanism therein require a type of gear construction not commonly put to any other use.

The gears in an automobile transmission must possess the capability of transmitting energy which not only varies greatly in amount but which undergoes variation from a positive value to a negative value. Such wide variation in energy transmitted causes a correspondingly wide variation in the tooth pressures of the gearing thus utilized, and exacts a type of gear construction known as "hard gears" as opposed to the other type in general use known as "soft gears."

**12.** Plaintiff's gears were generally of standard design and the gears in suit were made for use on motor vehicles. They were primarily manufactured, sold, and adapted for use upon and as replacement parts for motor vehicles, trucks, automobile wagons, and motorcycles.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This tax case involves an issue of fact. The suit is brought under the provisions of subdivision 3 of Sec. 900 of the Revenue Acts of 1918 and 1921, and subdivision 3 of Section 600 of the act of 1924. The acts of 1918 and 1921 (40 Stat. 1122, 42 Stat. 291) are in part as follows:

> Sec. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum.

Section 600 of the act of 1924 (43 Stat. 253, 322) reads as follows:

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body;

(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2) sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles.

No jurisdictional issue is involved. The payment of the excise taxes is conceded, and timely refund claims were filed

by the plaintiff. The judgment sought is for $26,412.70 and interest.

The case is disposed of by the findings, and an opinion in the case would not be necessary were it not for the fact that the plaintiff in connection with other contentions insists that the gears involved in this case are of the same type and in many respects identical to the gears involved in the case of *Frost Gear & Forge Co.* v. *United States*, 73 C. Cls. 750, for which plaintiff recovered a judgment under the statutes relied upon here.

This case and all similar cases must be adjudicated upon the facts of record. It is true that in the *Frost Gear and Forge Company case*, *supra*, the gears involved were similar and in many instances identical in type and construction to the gears in this case. There is, however, in this case a volume of proof pertinent and convincing, emanating from a source which cannot be questioned as to its worth, which should have been, but was not, in the record in the *Frost Gear and Forge case.*

This record develops the scientific fact that an automobile gear is indispensably one which must be primarily adapted for use in such a mechanism. It is true, of course, that such a gear may under certain conditions be used in other mechanisms when they are adapted for its use, but the demand for such a gear is in no sense commensurate with the demand for its use in automobiles. The fact that one gear may be used interchangeably in different mechanisms does not of itself determine the primary purpose of its manufacture.

It would be difficult, if not impossible, to state as a fact that the gears employed in automobiles may not under any and all circumstances be used in any other mechanism. As was said by the Supreme Court in the *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583, 584:

> Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are ex-

Syllabus

clusively so used. *Magone* v. *Wiederer*, 159 U. S. 555, 559. * * * It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

While the evidence in this case is somewhat conflicting, and rather sharp differences as to matters of fact obtain, the record does establish the fact that the type of gear taxed was not commonly put to a use other than in motor vehicles, and while adapted for use in other mechanisms their use depended to such an extent upon the identity of the mechanism in which they were to be used as to preclude the possibility of finding it to be a common use. Expert and disinterested testimony, predicated upon actual experience of many years in the automotive industry, we think confirms the findings, and the petition will be dismissed. It is so ordered.

WHALEY, *Judge*; WILLIAMS, *Judge*; and GREEN, *Judge*; concur.

LITTLETON, *Judge*, dissents.

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## GROVER BOHANNON v. THE UNITED STATES

[No. J-248. Decided June 1, 1936]

### *On the Proofs*

*Army pay and allowances; statute of limitation.*—The plaintiff entered the United States military service August 28, 1918. On November 9, 1918, he was assigned to Company D of the Development Battalion at Camp McClellan, Alabama; but, apparently through error, was sent to Company A of that battalion, where, without knowledge on his part of his assignment to Company D, he remained until the battalion, as a result of transfers and discharges, was disbanded in April 1919. Being absent from Company D, to which he had been assigned, he was dropped from the records as a deserter on December 30, 1918. After the disbanding of the battalion and abandonment of the camp, he procured other employment until June 29, 1925, when the War Department arrested him on a charge of desertion and held him until his acquittal of the charge, by general court-martial, and his subsequent honorable discharge from the military service on October 27, 1925.

Reporter's Statement of the Case

*Held*, (1) that the plaintiff was entitled to the statutory military pay and allowances for the periods from his enlistment on August 28, 1918, to April 1, 1919, and from his arrest on June 29, 1925, to his honorable discharge from the service on October 27, 1925, together with the additional pay of $60 upon his honorable discharge from the service; and (2) that the Soldiers' and Sailors' Civil Relief Act of March 3, 1918, was in force and suspended the running of the statutory limitation against suit on plaintiff's claim until within the 6-year jurisdictional period prior to the filing of his petition.

*The Reporter's* statement of the case:

*Mr. Albert S. Lisenby* for the plaintiff.

*Miss Stella Akin*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

Plaintiff sues to recover pay as a private in the Army for the period August 28, 1918, to April 1, 1919, and for the period June 29, 1925, to August 27, 1925, and the additional amount of $60 to which he was entitled upon being honorably discharged October 27, 1925.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff was inducted into the military service at Brunswick, Georgia, August 28, 1918, by selective service and sent to Camp Gordon, Georgia, where he was assigned to Company K, 1st Infantry Replacement and Training Regiment. He was transferred to the 157th Depot Brigade September 5, 1918, and to Camp McClellan, Alabama, September 14, 1918, and assigned to the development battalion at that camp on November 9, 1918.

When he was transferred to the development battalion at Camp McClellan, he was sent to Company A by an authorized officer in that battalion and was taken there by a corporal and a private. He remained with Company A in that battalion until the development battalion, as a result of transfers and discharges, was disbanded in April 1919. Plaintiff was not then discharged or transferred. At that time he made diligent inquiry of his captain and others, including a Y. M. C. A. official, none of whom was able to

locate any record of him or to inform him where he belonged. Plaintiff was never away from Camp McClellan at any time before April 1919, and during that period held himself in readiness to answer all formations.

2. In April 1919, after Camp McClellan had been abandoned and plaintiff was left there, he applied for work to a Mr. Borders, who operated a dairy about three miles away from the camp. At that time plaintiff was in uniform. He told Borders of his status as a soldier and that he did not know where he belonged. Plaintiff worked for Borders for about one year, beginning in April 1919, and at the outset worked in his army uniform for several weeks. In 1920 Borders sold his dairy and plaintiff moved to Piedmont to work for the purchaser. Subsequently, he worked in Birmingham, Alabama, Winter Haven, Florida, and Bartow, Florida. Subsequently to selling his dairy, Borders moved to Winter Haven, Florida, and, in response to an inquiry from a dairyman there, recommended plaintiff. Mr. Borders communicated with the plaintiff and had him move to Winter Haven, where he went into the employ of the dairyman from whom Borders had received the inquiry.

3. November 11, 1918, the War Department charged plaintiff with being absent without leave from Company D, 1st Development Battalion, Camp McClellan, Alabama, and he was dropped from the records of that organization on December 30, 1918, as a deserter. Plaintiff knew nothing of having been placed on the rolls of Company D of the development battalion. Actually, he merely stayed where he was placed and ordered to go in Company A of that battalion.

June 29, 1925, the War Department arrested plaintiff at Bartow, Florida, on a charge of deserting the military service. He was kept under arrest at Fort Benning, Georgia, for 71 days and required to work every day, Sundays included. He was finally arraigned and tried before a general court-martial on a charge of violation of the 58th article of war, on the single specification, as follows: "In that Private Grover Bohannon, Company 'D', 1st Development Battalion, Camp McClellan, Alabama, did, at Camp McClellan,

Alabama, on or about the 30th day of December 1918, desert the service of the United States, and did remain absent in desertion until he was apprehended at Bartow, Florida, on or about the 29th day of June 1925." To the charge and its specification the plaintiff pleaded not guilty.

The general court-martial findings promulgated September 23, 1925, on the charge and specification, were "Not guilty."

4. October 27, 1925, plaintiff was honorably discharged from the military service. His honorable discharge certifies "That Grover Bohannon (4,563,067), private, Co. 'D' 1st Development Bri. Camp McClellan, Ala., The United States Army, as a testimonial of honest and faithful service, is hereby honorably discharged from the military service of the United States."

Plaintiff never received any pay or allowances of any kind from the United States Army, except the sum of thirty dollars.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts have been set forth in the findings and need not be repeated in detail here. They show that plaintiff was inducted into the military service as a private August 28, 1918, and assigned to the Development Battalion at Camp McClellan, Alabama, on November 9, 1918. He was assigned to Company A in that battalion in which he served until Camp McClellan and Battalion Company "A" were disbanded April 1, 1919. When Battalion Company "A" was disbanded, plaintiff was not discharged and he was unable to ascertain from his officer or anyone else where he belonged, what he should do, where he should go, or to locate any record for himself. He was never paid any amount as pay and allowances of a private in the United States Army, except thirty dollars for the first month after he was inducted into the military service.

After Camp McClellan was disbanded plaintiff sought and obtained private employment nearby and continued to work at whatever he could find to do until June 29, 1925, when he

was arrested by the military authorities as a deserter from the Army. He was held under arrest and required to work every day for seventy-one days until he was tried by a general court-martial on the charge of violating the 58th article of war on the express specification that he had been a deserter from Company "D" Development Battalion at Camp McClellan. He was acquitted by the Board and was honorably discharged October 27, 1925.

The only defense to the claim is that it is barred by the statute of limitation.

With respect to the pay claimed by plaintiff for the period June 29, 1925, when he was arrested and put to work at the Army Post at Fort Benning, Georgia, until October 27. 1925, when he was honorably discharged, and the $60 additional amount allowed by law upon discharge, the defendant claims that recovery of pay and allowances for this period is barred because the same was not included in the original petition. It is clear, however, that this claim of the defendant cannot be sustained.

Plaintiff's original petition set forth that he was inducted into the Army in 1918 and served continuously in the military service as a private during the periods involved and until he was honorably discharged in October 1925, and that he was entitled to the pay and allowances allowed by law. This petition was filed within three years after the beginning of the period June to October 1925.

With respect to the pay and allowances claimed for the period August 28, 1918, to April 1, 1919, we are of opinion that plaintiff is entitled to recover. The Act of March 3, 1918, 40 Stat. 441, known as the Soldiers' and Sailors' Civil Relief Act, provided, so far as material here, as follows:

> SEC. 101. (1) The term "persons in military service", as used in this Act, shall include the following persons * * * : * * * all forces raised under the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States", approved May eighteenth, nineteen hundred and seventeen; * * * and members of any other body who have heretofore or may hereafter become a part of the military or naval forces of the United States.

(2) The term "period of military service", as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

(4) The term "court", as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

(5) The term "termination of the war", as used in this Act, shall mean the termination of the present war by the treaty of peace as proclaimed by the President.

SEC. 102. The provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein, * * *.

SEC. 205. The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service.

* * * * *

SEC. 603. This Act shall remain in force until the termination of the war, and for six months thereafter: *Provided*, That wherever under any section or provision of this Act a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided, the due exercise or enjoyment of which may extend beyond the period herein fixed for the termination of this Act, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of the proceeding, remedy, privilege, stay, limitation, accounting, or transaction aforesaid.

Under this act the running of the statute of limitation against plaintiff was suspended until the President's Proc-

lamation was issued on November 14, 1921, which was the termination of the war within the meaning of the statute, or until May 14, 1922, and for six months thereafter. Inasmuch as this proceeding was brought within six years after that date, the plaintiff is entitled to recover the full amount due for his military service.

Defendant contends, however, that the Soldiers' and Sailors' Civil Relief Act was terminated by virtue of the resolution of Congress of March 3, 1921, 31 Stat. 1359, which, so far as material here, was as follows:

> In the interpretation of any provision relating to the duration or date of the termination of the present war or of the present or existing emergency, meaning thereby the war between the Imperial German Government and the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States, in any Acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the duration or the date of the termination of such war or of such present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or existing emergency, notwithstanding any provision in any Act of Congress or joint resolution providing any other mode of determining the date of such termination.

With this we cannot agree. This Joint Resolution was intended only to repeal emergency legislation, to terminate the exercise of Executive authority under emergency legislation and to prevent the subsequent exercise of extraordinary powers unnecessary in connection with normal peacetime government functions. There had been a great deal of legislation expressly operative during "the present war", or the "present emergency" or the "existing emergency", etc. The Joint Resolution was designed to reach that class of legislation but it did not apply to the Soldiers' and Sailors' Civil Relief Act for the reason that this act was not made effective only for "the duration of the present war" or "during the present or existing emergency", or "until the termination of the present war or of the present

existing emergency", which is the language used in the Joint Resolution, but this act was effective "for the period of military service" of a soldier or sailor which extended to the date of honorable discharge, "but in no case later than the date when this Act ceases to be in force." The act was "to remain in force until the termination of the war, and for six months thereafter", and the phrase "the termination of the war" was specifically defined in the act as meaning "the termination of the present war by the treaty of peace as proclaimed by the President." In order to support the defendant's position, it would be necessary for the court to ignore the phrase "as proclaimed by the President." This we cannot do. Statutes effective until the termination of the war as so proclaimed by the President were clearly not included in the express language of the Joint Resolution of March 3, 1921. This view seems to be consistent with the understanding and intent of Congress, for, in the Act of March 4, 1923, 42 Stat. 510, the Congress terminated the right to make claims under subdivision 3 of section 302 of the Soldiers' and Sailors' Civil Relief Act (which section is not involved here) "unless the claim is successfully asserted in an action or proceeding, in a court of competent jurisdiction, commenced prior to the approval of this Act or within one year thereafter." Had the Civil Relief Act been repealed within the Congressional understanding by the Joint Resolution of March 3, 1921, there would obviously have been no necessity for the Act of March 4, 1923.

Plaintiff is entitled to recover the statutory pay and allowances to which he may be entitled for the periods August 28, 1918, to April 1, 1919, and June 29, 1925, to October 27, 1925, and the additional pay of $60 upon being honorably discharged on October 27, 1925. Judgment in favor of plaintiff will be entered upon the filing by the parties of a statement showing the amount due in accordance with this opinion. It is so ordered.

WHALEY, *Judge*; WILLIAMS, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

# CON P. CURRAN PRINTING COMPANY v. THE UNITED STATES

[No. J-657. Decided June 1, 1936]

*On the Proofs*

*Income and profits tax; depreciation or amortization of leasehold; statute of limitations; amendment of refund claim.*—Depreciation or amortization of the value of a leasehold was allowable as a deduction in determining the plaintiff's net taxable income; and amendment of plaintiff's claim for refund to include claim for such deduction could be made regardless of the statute of limitations if made before final action on the claim by the Commissioner of Internal Revenue.

*Invested capital; cost of standing printing type and forms.*—The proper cost of standing printing type or forms, held over by the plaintiff for future use, held allowable as invested capital, but the evidence held insufficient to establish the cost properly allowable to plaintiff as invested capital on this account.

*The Reporter's* statement of the case:

*Mr. Leo H. Hoffman* for the plaintiff. *Mr. Robert W. Knox* and *Hoffman & Knox* were on the brief.

*Mr. George H. Foster*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Missouri corporation with its principal office and place of business in St. Louis, where at the time involved in the case it was engaged in the printing and binding business, specializing in printing and storing forms commonly used by railroads, such as rate and tariff schedules, waybills, bills of lading, etc.

2. March 29, 1918, plaintiff filed its income and profits tax returns for 1917 reporting net income of $131,330.59, an invested capital of $756,442.27, and a total tax due of $24,429.06. April 28, 1920, plaintiff filed amended income and profits tax returns for 1917 which showed net income of $125,815.76, an invested capital of $764,334.58, and a total tax due of $18,230.54. The tax shown due on the original returns for 1917 was paid May 28, 1918.

On the same day on which the amended returns were filed plaintiff filed a claim for refund of the difference between the amounts shown on those returns and on the original returns, namely, $6,198.52. The basis for the reduction in tax liability as shown in the amended returns as compared with the original returns was that depreciation on machinery and equipment had been erroneously computed in the original returns and that certain errors had been made in the computation of invested capital.

**3.** In 1922 the Commissioner of Internal Revenue audited plaintiff's original and amended returns for 1917 and proposed an additional tax for that year both on account of an increase in net income and a reduction in invested capital. Thereafter, namely, January 15, 1923, plaintiff filed a further claim for refund for 1917 of $18,968.70 and assigned the following basis therefor with respect to changes in income:

> (1) The income as reported in the amended return for 1917 is overstated by $46,482.45, determined as follows:

| | | |
|---|---|---|
| Income as adjusted by Department's letter of July 17, 1922, reference IT: SA: CR: E-ABE | | $136, 841. 00 |
| *Deduct:* | | |
| Depreciation wrongfully disallowed by Department's letter of July 17, 1922, reference IT:SA:CR:E-ABE | $5, 905. 78 | |
| Inadequate depreciation taken on the return | 17, 641. 30 | |
| Bad debts wrongfully disallowed by Department's letter of July 17, 1922, reference IT: SA: CR: E-ABE | 173. 65 | |
| Cash memoranda charged off wrongfully disallowed by Department's letter of July 17, 1922, reference IT: SA: CR: E-ABE | 1, 029. 76 | |
| Bonus to officers and employees paid in 1917 and erroneously charged to surplus in that year | 32, 757. 00 | |
| | | 57, 507. 69 |
| Income as adjusted | | 79, 333. 31 |
| Income reported per amended return | | 125, 815. 76 |
| Overstatement of income per amended return | | 46, 482. 45 |

In this claim plaintiff also sought to have invested capital as set out in the Commissioner's proposed determination increased in various ways, one of which was in the

amount of $235,478.60 on account of the alleged cost of standing type and forms. This item had been included by plaintiff in both its original and amended returns as an asset in determining its invested capital for 1917, but it had been excluded by the Commissioner in his proposed determination.

4. January 20, 1925, plaintiff filed a protest with the Commissioner in connection with proposed action by the Commissioner on its returns and claims for refund for 1917, in which plaintiff requested that it be given a deduction in addition to those previously requested for exhaustion of the March 1, 1913, value of a leasehold.

April 1, 1925, plaintiff filed a further claim for refund for 1917 in the amount of $2,200 and assigned in part the following basis therefor:

> 1. This claim does not supersede but is supplemental to the amended claim filed on or about January 13, 1923, for the refunding of $18,968.70 representing 1917 income and profits taxes overpaid and is based in part upon one of the grounds stated in the rider attached to said claim, namely, an adjustment to income on account of depreciation.
>
> 2. Stated more specifically, this claim is based upon additional depreciation or exhaustion allowable on a leasehold or lease not heretofore recognized by the Department for depreciation purposes. The grounds are more fully set out in a letter dated January 20, 1925, filed with the Department by claimant's attorneys, Kix-Miller & Baar, a copy of which letter is attached hereto and made a part hereof as though set out herein at length.

5. November 18, 1926, the Commissioner issued a certificate of overassesment for 1917 in favor of plaintiff in the amount of $7,727.95. Such amount represented an overpayment, and shortly thereafter $6,713.20 of that sum was applied as a credit to plaintiff's tax liability for 1918 and $1,014.75 for 1919. The validity of the foregoing credits is not now in dispute.

In determining plaintiff's tax liability for 1917 in connection with the issuance of the certificate of overassessment referred to above, the Commissioner refused to allow a deduction from gross income of $8,280.92 for amortization of

the March 1, 1913, value of a leasehold for the reason that the Commissioner considered that a timely claim for refund on account of that item had not been filed by plaintiff. The parties have stipulated, however, that in the event the court should find that the claims for refund for 1917 were adequate and sufficient to constitute a proper claim for the refund of the tax attributable to a deduction from gross income on account of amortization of the March 1, 1913, value of the leasehold in question, plaintiff is entitled to a deduction on that account for 1917 of $8,280.92, the amount allowed by the Commissioner for 1918.

The three claims for refund described in Findings 2, 3, and 4, to the extent they were not allowed, were disallowed on November 18, 1926.

6. June 16, 1919, plaintiff filed its income and profits tax return for 1918 showing a tax liability of $10,563.56, which was paid in installments during 1919. April 28, 1920, plaintiff filed an amended return for 1918 showing a tax liability of $7,780.98, and on the same day filed a claim for refund of the difference between the amounts shown on the original and amended returns.

7. March 10, 1924, plaintiff filed a waiver for 1918 which was to remain in effect for the period of one year after the expiration of the statutory period of limitations applicable thereto.

8. In March 1924 the Commissioner made an additional assessment for 1918 of $23,917.27 and at or about the same time rejected the claim for refund theretofore filed for the same year. March 14, 1924, plaintiff filed a claim for the abatement of the additional assessment and a refund of $39.05. The claim for abatement and refund was rejected March 21, 1925. March 31, 1925, plaintiff filed a further claim for refund for 1918 of $4,808.10.

In both the claim for abatement and refund filed March 14, 1924, and the claim for refund filed March 31, 1925, plaintiff asked, *inter alia*, that it be allowed to include in invested capital an item of $235,478.60, representing the cost of standing type and forms, an item which had been included as a part of invested capital in both its original and

amended returns for 1918, but which had been excluded therefrom in the determination by the Commissioner.

**9.** Thereafter the Commissioner determined plaintiff's tax liability for 1918 to be $17,276.76 and that there was accordingly an overassessment for that year of $17,204.07. Since there was then an outstanding assessment of $23,917.27, such assessment was abated on November 18, 1926, to the extent of the overassessment and the balance, $6,713.20, was satisfied December 3, 1926, by a credit of that amount from the overpayment for 1917. (See finding 5.) As a result of further protests by the plaintiff the Commissioner on September 12, 1929, issued another certificate of overassessment for 1918 in the amount of $4,279.06. This certificate was prepared in November 1928, and on May 23, 1929, prior to its issuance plaintiff filed another claim for refund for 1918 in the amount of $6,713.20. The last mentioned claim for refund was rejected August 16, 1929, and the overassessment of $4,279.06, which was found to be an overpayment, was refunded to plaintiff in or about September 1929.

**10.** Plaintiff began business about 1893 or 1894. Prior to 1902 or 1903 its type was set up from foundry type, and knocked down after a printing job therefrom, since it was too expensive to keep it standing. In 1902 or 1903 the monotype machine was introduced and its use was begun by plaintiff. After plaintiff began to use the monotype machine it also began to set up or build standing type and forms which were not immediately destroyed after a given job for which they were prepared, but they were stored and kept in order that they might be utilized in the event "repeat" orders were obtained for a like or similar job. As an aid to their location a proof was taken of the standing type and forms as they were prepared and a record made thereon of their location on the shelves or in their storage places. In that manner a proof book was compiled in which each proof was placed. As standing type and forms were destroyed proof sheets were removed from the proof book. The sheets in the proof book were used by plaintiff as a basis for determining the standing type and forms on hand, subject to an inventory check at irregular intervals. The standing type and

forms as shown by the proof book also served as a basis for determining the amount of insurance to be carried thereon, which insurance was approximately $500,000 from about 1912 to 1916, and $1,000,000 in 1917 and 1918. Forms commonly used by railroads such as rate and tariff schedules, waybills, bills of lading, etc., were kept standing. Very little commercial type and forms were kept.

Plaintiff advertised the fact that it had standing type and forms on hand which had been prepared in connection with other jobs and that accordingly it could give a better price on another like or similar job, and turn out the work more quickly than a concern which was not so advantageously situated.

Whether "repeat" orders would be obtained with respect to given forms could not be foretold and plaintiff generally followed the practice of keeping the standing type and forms as long as there remained a fair possibility of their subsequent use in another order. When the railroads, for example, which were plaintiff's principal customers, definitely discontinued a particular type of form which had previously been printed by plaintiff, plaintiff would destroy, that is, knock down, the standing type and forms from which it was printed, and that would likewise be done by plaintiff from time to time when it appeared that little or no probability existed for the future use of any standing type and forms which it had on hand. And again, one form might be superseded by another form, both of which were printed by plaintiff, in which event the old standing type and forms would be knocked down and new type and forms set up.

In some instances, for example, in tariff schedules, a substantial part of the form from which the original schedules were printed could be used when minor changes were made in the schedules and that would be continued from time to time until it became expedient to print an entirely new schedule. In the foregoing manner standing type and forms were being set up from the inception of the use of the monotype machine in 1903 to beyond 1920, and at the same time old standing type and forms were being destroyed. The former, however, took place to a greater ex-

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tent—at least until 1919—than the latter with the result that there was a gradual increase in the quantity of standing type and forms on hand. Standing type and forms suffer no appreciable depreciation through use and plaintiff has never set up depreciation thereon on its books or made a claim for a deduction from gross income in its income tax returns on account thereof.

**11.** In 1910 plaintiff had an appraisal made of its standing type and forms, electrotypes, engravings, and other similar articles which showed quantities on hand and their cost of production as follows:

| | |
|---|---|
| 27,011 pages passenger and freight-rate schedules from B1 to B1340, at $8.00 per sheet | $216, 088. 00 |
| 4,679 pages R. R. and commercial miscellaneous jobs from C–169 to C–4848, at $10.00 per sheet | 46, 790. 00 |
| 52,059 cardboard bottoms for pages | 491. 30 |
| 750,000 sq. ins. electrotypes, at .03 | 22, 500. 00 |
| 70,000 sq. ins. zinc etchings (2,000 plates average 35 sq. ins. to plate), at .05 | 3, 500. 00 |
| 21,000 sq. ins. half tones (1,000 plates average 21 sq. ins. to plate), at .15 | 3, 150. 00 |
| 1,095 pages 6 pt. foundry type on miscellaneous jobs | 4, 927. 50 |
| 1,000 boxes type sorts, 6–8–10–12 pts | 2, 000. 00 |
| 500 packages type sorts, 14–18–24–30 & 36 pts | 1, 250. 00 |
| 375 lbs. quads, 12–18–24 & 36 pts | 112. 50 |
| 17 cases wood type, 340 characters | 289. 00 |
| 917 railroad seals and commercial trade marks, zinc and electros, at .70 | 641. 90 |
| 500 copper engravings | 1, 000. 00 |

The cost set out above represented metal cost of $67,261.60, which had previously been capitalized and appeared on plaintiff's books, and labor cost of $235,478.60, which had previously been charged to expense and accordingly was not represented on plaintiff's books as an asset account. The labor costs did not include an additional item of $78,816, the labor composition cost for the 750,000 square inches of electrotypes. That item was never entered on plaintiff's books either in connection with the appraisal or otherwise as a capital item, but it was charged to expense in the same manner as other labor costs. The standing type and forms set out in the appraisal were manufactured or set up from 1903 to 1910, inclusive, approximately seventy-five percent being manufactured from 1907 to 1910.

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12. July 31, 1913, plaintiff made the following entry on its books:

| | | |
|---|---|---|
| Rate schedules—electros and type & forms a/c | $302, 740. 20 | |
| To electros a/c | | $9, 516. 35 |
| " metal a/c | | 32, 724. 19 |
| " type & forms | | 25, 021. 06 |
| " Con P. Curran personal a/c | | 235, 478. 60 |

The board of directors in meeting assembled voted to open a new account on the books of the company to be known as "Rate schedules—Electros & type & forms a/c" and ordered transferred by journal entry to the new a/c the amounts at this date charged to "Electros a/c, metal a/c, and type & forms a/c", respectively, and also charge to this account and credit to the personal a/c of Mr. Con P. Curran the amount of difference between the total of these accounts as charged at this date ($67,261.60) to make the new account total the amount of appraisal as made by the "American Appraisal Co." of Milwaukee, Wis., which total is $302,740.20, making amount to be credited to Mr. Con P. Curran a/c—$235,478.60 and that these entries when made in the journal be duly approved by the 2nd vice president and the secretary by affixing their signatures as officers of the company to entry made in journal.

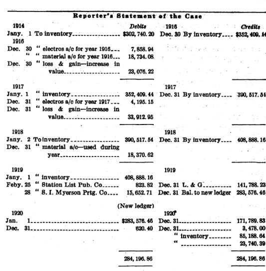
FLORANCE J. CURRAN, *2d Vice President.*
A. S. HART, *Secretary.*

At the time the foregoing entry was made the first three items appearing in such entry as credits appeared on plaintiff's books as asset items, representing the cost of the material for those items but not including any labor costs. After the posting of the journal entry the three old accounts were eliminated, and thereafter appeared in the asset account shown in finding 13. The last item, $235,478.60, represented the labor cost entering into the finished articles mentioned.

At the time the foregoing entry was made additional stock was issued to plaintiff's president on account of the credit balance thus set up in his account on plaintiff's books.

13. The following account entitled "Standing type & plates, forms, etc." appeared on plaintiff's books:

| 1913 | | *Debits* | 1913 | *Credits* |
|---|---|---|---|---|
| July 31 | To electros a/c | $9, 516. 35 | Dec. 31 By inventory | $302, 740. 20 |
| " " | metal a/c | 32, 724. 19 | | |
| " " | type & forms a/c | 25, 021. 06 | | |
| " " | Con P. Curran | 235, 478. 60 | | |



| Date | Entry | Debits | Date | Entry | Credits |
|---|---|---|---|---|---|
| 1914 | | | 1916 | | |
| Jany. 1 | To inventory | $302,740.20 | Dec. 30 | By inventory | $352,409.44 |
| 1916 | | | | | |
| Dec. 30 | " electros a/c for year 1916 | 7,858.94 | | | |
| " | " material a/c for year 1916 | 18,734.08 | | | |
| Dec. 30 | " loss & gain—increase in value | 23,076.22 | | | |
| 1917 | | | 1917 | | |
| Jany. 1 | " inventory | 352,409.44 | Dec. 31 | By inventory | 390,517.54 |
| Dec. 31 | " electros a/c for year 1917 | 4,195.15 | | | |
| Dec. 31 | " loss & gain—increase in value | 33,912.95 | | | |
| 1918 | | | 1918 | | |
| Jany. 2 | To inventory | 390,517.54 | Dec. 31 | By inventory | 408,888.16 |
| Dec. 31 | " material a/c—used during year | 18,370.62 | | | |
| 1919 | | | 1919 | | |
| Jany. 1 | " inventory | 408,888.16 | | | |
| Feby. 25 | " Station List Pub. Co | 823.82 | Dec. 31 | L. & G | 141,788.23 |
| 28 | " S. I. Myerson Prtg. Co | 15,652.71 | Dec. 31 | Bal. to new ledger | 283,576.46 |
| | | (New ledger) | | | |
| 1920 | | | 1920 | | |
| Jan. 1 | | $283,576.46 | Dec. 31 | | 171,789.83 |
| Dec. 31 | | 620.40 | Dec. 31 | | 3,478.00 |
| | | | " | inventory | 85,188.64 |
| | | | " | | 23,740.39 |
| | | 284,196.86 | | | 284,196.86 |
| 1922 | | | 1922 | | |
| Jan. 3, | inventory | 85,188.64 | Dec. 30 | | 36,091.92 |
| | | | " | | 49,096.72 |
| | | 85,188.64 | | | 85,188.64 |

The first three items in the above account, under date of July 31, 1913, were the ledger entries made for the purpose of setting up the amounts which were eliminated from these accounts by the journal entry set out in finding 12. The last item under date of July 31, 1913, represented labor costs in connection with standing type and forms on hand when an appraisal was made in 1910. The entries in the account "To inventory" and "By inventory" did not mean that inventories were taken and entries made accordingly, but were merely notations made by the bookkeeper in closing the account at various intervals.

While the quantity of standing type and forms on hand, as well as the cost of labor entering therein, increased gradually from 1910 to December 31, 1919, no change was made

in the account on account of the additional labor costs, which were represented in the greater quantity of standing type and forms on hand.

**14.** Plaintiff followed the practice of charging the cost of metal, used in the preparation of its standing type and forms, to an asset account, on which no depreciation was taken, but the cost of composition (exclusive of "metal cost") was charged through its pay rolls to expense. The only variation from that practice occurred in connection with the journal entry referred to in finding 12.

There was little or no change in plaintiff's labor and material costs from 1910 to March 1, 1913, except for a slight increase, but the cost of both labor and material increased gradually after March 1, 1913, with the result that the cost of the standing type and forms on hand March 1, 1913, as well as at the beginning of 1917, 1918, 1919, and 1920, was in excess of that shown by the appraisal in 1910. There was also a gradual increase in the quantity of standing type and forms on hand from 1910 to the end of 1919, though, as shown in finding 13, plaintiff made no increase or change in the asset account because of the labor entering into its composition.

**15.** In the audit of plaintiff's returns and claims for refund for 1917 and 1918 the Commissioner excluded from invested capital $235,478.60, the item which was set up on plaintiff's books in 1913 on the basis of an appraisal made in 1910 to record the labor costs which entered into the standing type and forms on hand in 1910, but which costs had previously been charged to expense. Similar costs from 1910 to 1920, inclusive, were likewise charged to expense. Plaintiff had on hand at all times during 1917 and 1918 a larger quantity of standing type and forms than in 1910 and 1913, whose cost was in excess of that on hand in 1910 and 1913, but the record is insufficient to show when that on hand in 1917 and 1918 was set up and whether any part of it was in existence in 1910 and 1913. The record is likewise insufficient to show when any of the standing type and forms on hand during 1917 and 1918 were last used or their probable future use.

The court decided that plaintiff was entitled to recover.

Opinion of the Court

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff is a corporation engaged in the printing business, specializing in printing forms commonly used by railroads. The action is begun to recover a refund of a part of the income and excess profits taxes for the years 1917 and 1918. The case is divisible into two parts. One part relates only to the year 1917 and is based upon the claim that the Commissioner erred in refusing to allow a deduction for depreciation of the leasehold in 1917 on the ground that no timely claim for refund was filed. The other part involves both of the years 1917 and 1918 and is based on the claim that the Commissioner, in determining the amount of plaintiff's invested capital for those years, refused to allow the labor cost of composition of standing type and forms.

Plaintiff paid its tax for 1917, as shown due by the original return, on May 28, 1918. On January 15, 1923, plaintiff filed a claim for refund, the basis of which is set out in full in finding 3, from which it will be seen that one of the items for which claim was made was "Inadequate depreciation taken on the return, $17,641.30." In this claim plaintiff also sought to have invested capital as set out in the Commissioner's proposed determination increased in various ways, one of which was in the amount of $235,478.60 on account of the alleged cost of standing type and forms. January 20, 1925, plaintiff filed a protest with the Commissioner in connection with the proposed action of the Commissioner on its returns and claims for refund for 1917, in which plaintiff requested that it be given a deduction in addition to those previously requested for exhaustion of the March 1, 1913, value of the leasehold; and on April 1, 1925, plaintiff filed a further claim for refund for 1917 in which it was stated that this claim did not supersede but was supplemental to the claim filed about January 13, 1923, and "more specifically, this claim is based upon additional depreciation or exhaustion allowable on a leasehold or lease not heretofore recognized by the Department for depreciation purposes."

November 18, 1926, after consideration of the case as it then stood, the Commissioner issued a certificate of over-

assessment for 1917 in favor of plaintiff in the amount of $7,727.95 for which plaintiff received credit on other taxes. The Commissioner, however, refused to allow deduction for depreciation or amortization of the value of leasehold, holding that a timely claim for refund on account of that item had not been filed.

It will be observed that the claim for depreciation on leasehold was not brought to the attention of the Bureau until January 20, 1925, and was not specifically mentioned in the claim until April 1, 1925, both dates being after the period of limitation had run.

There may be some question whether the expression "taken on the return", used in the second claim for refund which was filed in time, refers to depreciation matters generally or only to those of the kind mentioned in the return, but we do not find it necessary to pass on this point. In *Youngstown Sheet & Tube Co. v. United States*, 79 C. Cls. 683, a similar state of facts was presented. The plaintiff based its original claim for refund on the failure to allow specific deductions from gross income and it was held that the claim could be amended after the statute had run to include other claimed reductions in income when the amendment was filed before the claim had been finally acted upon by the Commissioner, and reconsideration thereof resulted in a new audit of the entire case showing an overpayment. The decision in the *Youngstown case, supra*, was made after the Supreme Court had decided *United States v. Henry Prentiss & Co.*, 288 U. S. 73; *United States v. Factors & Finance Co.*, 288 U. S. 89; *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62; and *Bemis Bro. Bag Co. v. United States*, 289 U. S. 28. The opinion in the *Youngstown case, supra*, referred to all of the Supreme Court cases mentioned above and held that the decision was in accord with them. The case of *United States v. Richards*, 79 Fed. (2d) 797, is cited as presenting a contrary view, but certiorari having been denied in the *Youngstown case* we find no reason for changing the rule laid down therein and hold that the amendment is not barred by the statute of limitations. The parties agree that if the refund claim was filed in time the plaintiff is entitled to a deduction from gross income in 1917

on account of amortization of the value of the leasehold in the sum of $8,280.92, which will accordingly be allowed in computing the correct amount of plaintiff's taxes for that year.

In the other division of the case, the plaintiff claims to be entitled to the inclusion in invested capital for 1917 and 1918 of the cost of its standing type and forms in existence on March 1, 1913, and (as it alleges) kept current by additions and replacements, all of which were currently charged to expense. The question here raised is primarily one of fact. We think plaintiff is entitled to have included in its invested capital the value of its standing type and forms which were on hand for the separate years of 1917 and 1918, but it is insisted on behalf of defendant that this value has not been shown by the evidence. The commissioner of this court who heard the testimony has found that it does not show when the forms on hand in 1917 and 1918 were set up, or whether any part of that then preserved was in existence in 1910 and 1913. He also found that the record is insufficient to show when any of the standing type and forms on hand in 1917 and 1918 was last used, or the probable future use. After a review of the evidence we concur in this finding. (See finding 15.)

It is clear that under this state of facts plaintiff is not entitled to include in invested capital the labor costs incurred in previous years in making standing type and forms. The plaintiff lays stress on the fact that the evidence shows that the amount of standing type and forms was kept current after 1910, at which time an appraisement was made, but this does not fill the gap in the evidence. It is argued on behalf of plaintiff that it would have been impossible to make the evidence more definite. To this we do not agree. An expert witness who was familiar with the forms and type kept on hand in 1917 and 1918 by plaintiff could testify as to their value, subject to cross-examination as to his knowledge of the amount on hand. Some seven or eight years had elapsed since 1910 and, as we have already noted, the evidence is insufficient to show when that on hand in 1917 and 1918 was set up, or whether any part of what was then preserved was in existence in 1910

Syllabus

and 1913. The Commissioner of Internal Revenue excluded from invested capital $235,478.60, an item which was set up on plaintiff's books in 1913 on the basis of an appraisal made in 1910 to record the labor costs which plaintiff claims entered into the standing type and forms on hand in 1910, these costs having been previously charged to expense. The plaintiff contends that the Commissioner instead of reducing the invested capital reported should have increased it by $373,418.40 on account of the cost of standing type and forms, but the matters necessary to sustain this contention are not established by the evidence, which does not present a sufficient basis for setting aside the Commissioner's ruling.

If counsel for plaintiff and defendant can agree upon the amount of refund to which plaintiff is entitled under the foregoing opinion, judgment will be rendered in accordance with the agreement; otherwise the court will make the calculation and enter judgment.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

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## GEORGE SYDNEY BINCKLEY, TRACY CHATFIELD BECKER, AND RAYMOND IVES BLAKESLEE v. THE UNITED STATES

[No. K-494. Decided June 1, 1936]

*On the Proofs*

*Patent for dam; validity of patent.*—Plaintiffs' patent no. 1081199, for improvement in dams, held invalid.

*Acquiescence in Patent Office rejection of claims; estoppel.*—Where an applicant for a patent acquiesces in the rejection of his claims by the Patent Office, he is estopped to claim the benefit of such claims or such a construction of his allowed claims as would be equivalent thereto.

*Validity of patent; invention; amendment of rejected claim; failure of patent to show new results of modification.*—Where the patent fails to show wherein the subject matter of an amended rejected claim will function in any respect differently from the subject matter of the claim before its amendment, the amendment does not render the claim valid; a modification of an existing form of construction which brings about no new result is not invention.

Reporter's Statement of the Case

*Cancelation and amendment of claims; strict construction of claims.*—A patentee who voluntarily canceled certain claims and amended a substituted claim to meet repeated rejections by the Patent Office upon references to the prior art, subjects his claims, when challenged as to validity, to a strict construction, and whatever elements of the invention were relinquished by him are effectually eliminated from the patent.

*Nonuser of patent; construction of claims.*—While nonuser of a patented invention will not deprive the owner of his patent rights, it does under certain circumstances preclude a broad construction of the patent claims.

*Validity of patent; prior publication.*—Where the defense in a patent suit is invalidity of the patent because of prior publication, it is immaterial whether the prior publication structure was ever constructed.

*The Reporter's* statement of the case:

*Mr. David P. Wolhaupter* for the plaintiffs. *Mr. Raymond Ives Blakeslee* was on the briefs.

*Mr. Clifton V. Edwards*, with whom was *Mr. Assistant Attorney General George C. Sweeney*, for the defendant. *Mr. J. F. Mothershead* was on the brief.

The court made special findings of fact as follows:

**1.** A dam is an artificial barrier generally constructed of earth, masonry, or concrete for the purpose of confining the flow of a stream and thus raising its level. Dams may be divided into two general classes of structures, known respectively as the gravity dam and the arch dam. The gravity dam is a plain mass of earth, masonry, or concrete having an inclined-downstream face and a vertical or inclined-upstream face. The proportions of the height of the gravity dam to its thickness are such as to suitably resist the tendency to overturn and the weight of the structure is such as to hold it in place by gravity and prevent it from being moved bodily downstream by the weight of the impounded water behind it.

The arch-type dam is a curved structure usually built of masonry or concrete with its convex surface upstream. The stresses of the impounded water are imparted through the curved construction, which functions as a horizontal arch, to abutments at either end of the arch. In the case of a

single arch dam two abutments or buttresses are provided, one at either side of the stream or canyon, and in the case of the multiple arch dam the stresses are transmitted to a plurality of abutments or buttresses across the stream. These two general types of dam construction were known to those skilled in the art long prior to the conception of the dam structure which resulted in the issuance of the patent in suit.

Some dams involve a combination of the gravity- and arch-type.

For any location the type of dam and the materials used in the construction thereof are dependent upon such elements as the character of the stream; the width of the canyon or valley; the height and size of the dam; the character of the foundation rock, and the relative availability of the various kinds of constructional material of the dam site.

There is no one type of dam that will fit all kinds of locations and be the best and most economical to construct.

2. In the early part of 1905, George Sydney Binckley, a citizen of the United States and one of the plaintiffs in this case, prepared an illustrated treatise entitled "The Conoidal Dam."

This treatise which relates to a dam construction similar to that set forth in the patent in suit was disclosed to others in the early part of 1905.

The original treatise which was in typewritten form, plaintiffs' exhibit 10, is by reference made a part of this finding.

3. On July 12, 1909, Binckley filed an application for United States letters patent for dams. Binckley assigned a one-third interest in this application to Tracy C. Becker and Raymond Ives Blakeslee, coplaintiffs with Binckley in the present case.

The illustrated embodiment and the specifications accompanying the application, except as hereinafter noted, were substantially identical with the drawings and specifications of the patent in suit as issued.

The claims as originally filed were as follows:

1. A dam having a conoidal surface opposed to the service pressure thereon.

2. A dam having a laterally curved and vertically inclined surface opposed to the service pressure thereon.

3. A dam having a laterally curved and vertically inclined surface opposed to the service pressure thereon; the body thereof varying in transverse dimensions.

4. A dam having a laterally curved and vertically inclined surface opposed to the service pressure thereon; the body thereof increasing in transverse dimensions from the crown to the base thereof.

5. A fragmentary conoidal dam having an inclined and curved surface opposed to the service pressure.

6. A dam installed in the bed and between the banks of a stream and having a surface inclined upwardly from the bed and curving between the banks.

Subsequent to the first office action which cited prior art, these claims were amended by the addition of the italicized portions as indicated:

1. A dam having a conoidal surface opposed to the service pressure thereon.

2. A dam having a laterally curved and vertically inclined surface opposed to the service pressure thereon *and having a downwardly increasing radius.*

3. A dam having a laterally curved and vertically inclined surface opposed to the service pressure thereon *and having a downwardly increasing radius;* the body thereof varying in transverse dimensions.

4. A dam having a laterally curved and vertically inclined surface opposed to the service pressure thereon *and having a downwardly increasing radius;* the body thereof increasing in transverse dimensions from the crown to the base thereof.

5. A fragmentary *upright* conoidal dam having an inclined and curved surface opposed to the service pressure.

6. A dam installed in the bed and between the banks of a stream and having a surface inclined upwardly from the bed and curving between the banks *with a varying radius.*

The Patent Office in its next action cited the prior art patent to Schmolz, #165371, issued July 6, 1875 (referred to in detail in finding 22).

The applicant in response thereto canceled the claims and substituted one claim as follows:

A dam having a horizontal curvature the radius of each face of which increases downwardly.

The Patent Office then referred to the Schmolz patent as follows:

> This case has been again considered as amended Jan. 11, 1911.
>
> The claim now presented must be held not to distinguish over the Schmolz patent, of record, because the drawing in applicant's case shows a portion of the dam, namely, all that part below the 4th line from the bottom which is exactly like the Schmolz construction, in that the radius of the face of the curve facing downstream *decreases* rather than "increases" downwardly. This is just what the reference shows. The claim is therefore rejected.

In response to this action the applicant amended the single claim in the case by adding thereto the phraseology as indicated by italics:

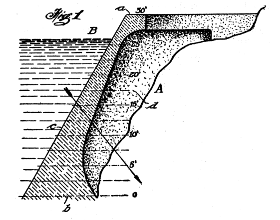
> A dam having a horizontal curvature the radius of each face of which increases downwardly *through a portion of the height thereof.*

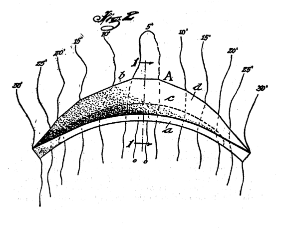
The application was then allowed and passed to issue on May 8, 1911. The applicants failed to pay the final fee within six months from the date of notice of allowance and the application which therefore became forfeited on November 8, 1911, was renewed within the statutory two-year period permitted for renewals prior to May 2, 1927, on May 6, 1913, and was again allowed on May 16, 1913. The final fee of $20 was paid November 13, 1913, and the patent in suit #1081199 was issued on said application on December 9, 1913.

A certified copy of the file wrapper and contents of said patent application, plaintiffs' exhibit 1, is by reference made a part of this finding.

4. The patent in suit #1081199 is stated to relate to a dam "superior in point of durability, positiveness, and security in service, relative to simplicity and inexpensiveness of construction and installation, and general efficiency." The patentee states that he has devised a dam resting upon the principle of a *cone or conoid.* Figures 1 and 2 of the patent in suit, which are reproduced herewith, disclose, respectively,





Fig. 1
a
30'
B
25'
20'
A
15'
d
c
10'
5'
0
b


Fig. 2
5'
10'
15'
20'
25'
30'
1
b
A
d
c
a
0
0

a vertical sectional view and a top plan view of a cone-shaped dam which the patentee has selected to use as an illustrative embodiment of his invention.

The specification states with reference to this specific embodiment, that—

> The dam A, which may be of any construction and formation with respect to its constitution and organization in part or in whole, and the composition of which may be of concrete, masonry, or other material, has the general form of a truncated fragmentary cone or conoid, the crown *a* of which may be plane, and the base *b* of which may be formed as desired and requisite for its proper installation in and connection or uniting with the formation C; the extreme base being embedded in such formation. The crown *a* describes approximately the arc of a circle having its center downstream or away from the obstructed water B; and the pressure-receiving face or profile *c* of the dam has a curvature corresponding in general to that of the surface of a cone or conoid; whereby an approximately straight line may be drawn upon and lying within the face or profile *c*, from any point of the crown *a*, and in a vertical plane, to the base *b*. The forward face *c* has an increasing radius from the crown *a* toward the base *b*. The rearward face *d* of the dam may be of any predetermined and desired formation in conformity with the massing of the constituent material of the dam between the faces *c* and *d*.

The patentee states also with respect to the operation and principle of construction involved, as follows:

> The operation, principle of construction and service, and advantages, of the improved dam constituting the invention, will be readily understood from the foregoing description taken in connection with the accompanying drawing and the following statement: The dam A being of generally conical or conoidal form with respect particularly to the forward face or profile *c* thereof, the pressure of the body of water B upon the upwardly inclined profile *c*, is transmitted to the surrounding and supporting formation C through the dam along such lines resultant of horizontal and vertical pressure as to add to the stability and safety of the dam in its opposition to the stress of the body of water

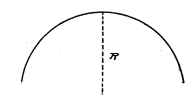
B. Such resultant is indicated approximately by the arrow in Fig. 1. The pressure of the water upon the dam therefore tends to more firmly anchor and sustain the same in its bed or location in connection with the formation C; and its arched form in the horizontal plane gives support to the structure against the pressure of the impounded water, and transmits the horizontal stresses originating in such pressure to the abutments and the formation C. It results, therefore, that the dam will hold and stand against the pressure of the body of water in spite of decrease of transverse dimensions of the dam with relation to those of dams of other types; and that whereas such dams of other types under the same pressure and having relatively increased transverse dimensions might fail and be swept away or demolished, the improved conoidal dam constituting the invention will remain stable and safe. It will be understood that the faces *c* and *d* referred to herein as the forward and rearward faces, designate respectively the faces which are presented upstream and downstream.

5. The patent specification attempts to make a comparison between the dam structure forming the basis of the patent in suit in what is termed "dams as now constructed according to standard practice." It is not clear to those skilled in the art what is meant by this latter phrase, as the variety of conditions such as the character of the river bed, the character of the stream, the width and height of the canyon walls, and their contour and material, and the variation and cost of dam building materials in any given locality, preclude what might be termed "standard practice." Depending upon the availability of material, concrete construction work may vary in cost from $3 to $10 per cubic yard.

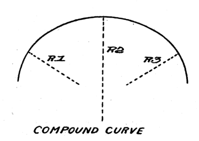
Under certain constructional conditions a gravity-type dam would be cheaper to construct than the type of dam forming the basis of the patent in suit.

6. The patent specification does not set forth the specific unit stresses to be employed in calculating a dam of the type described therein, but those skilled in the art and accustomed to making stress calculations in arch-shaped dams could make the necessary stress calculations for concrete,






CIRCULAR CURVE



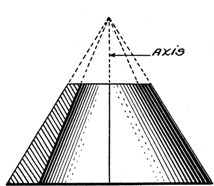

COMPOUND CURVE

masonry, or other conventional materials and construct a dam in accordance with the illustrated embodiment of the patent in suit.

7. Geometrically a curve may either be a circular curve, in which case it has a single radius as shown in Fig. 1, or a compound curve, in which case it has a plurality of radii of different lengths springing from different points of origin as shown in Fig. 2.

**8.** A cone is a solid figure that tapers uniformly from a circular base to a point and may be contemplated as produced by the rotation of an oblique line, one end of which moves in a circle and the other end of which is fixed in a line passing through the center of the circle and termed the axis of rotation. If the axis of rotation is perpendicular to the circle through which the end of the oblique line rotates, the



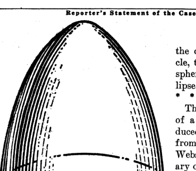



RIGHT CONE

cone is then known as a right cone. Figure 3 illustrates a development of a right conical hollow cone frustum.

The hollow cone here shown may be contemplated as being produced by the rotation of the inner and outer oblique lines about an axis of revolution perpendicular to the circles of origin at the base.

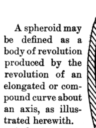
**9.** The conoid is defined in the 11th edition of the Encyclopedia Britannica as "solids or surfaces formed by the revolution of a conic section about one of its principal axes. If



CONOID

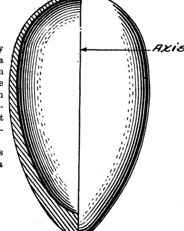
the conic be a circle, the conoid is a sphere; if an ellipse, a spheroid * * * ."

The illustration of a conoid reproduced herewith is from page 476 of Webster's Dictionary of 1912.



A spheroid may be defined as a body of revolution produced by the revolution of an elongated or compound curve about an axis, as illustrated herewith.

A hen's egg is an example of a spheroid.




SPHEROID

**10.** When a conoid or a cone is cut by a plane perpendicular to its axis of revolution, a circular curve is produced having a radius represented by the distance from the axis of revolution to any point in the plane where it cuts the surface of the conoid or cone.

When a conoid or cone is cut by a plane not perpendicular, but at an angle to its axis of revolution, a compound curve is formed, which curve has a plurality of radii instead of a single radius.

**11.** The single claim of the patent in suit is as follows:

> A dam having a horizontal curvature the radius of each face of which increases downwardly through a portion of the height thereof.

The phraseology of this claim with respect to the use of the term "radius" implies a cone or conoid form in which the axis of revolution is perpendicular to the horizontal planes in which the horizontal curvature is assumed, thus giving a circular curve having a radius.

The phraseology of the claim is ambiguous to those skilled in the art with reference to the specification, in that it specifies the form of the rearward or downstream surface as well as that of the upstream surface whereas the specification states—

> The rearward face *d* of the dam may be of any predetermined and desired formation in conformity with the massing of the constituent material of the dam between the faces *c* and *d*.

The specification fails to disclose to the man skilled in the art the meaning or extent of the phrase occurring in the claim "through a portion of the height thereof" other than the specific illustrated embodiment disclosed in Fig. 1 of the drawings in which the total height of the dam is indicated as 30 feet, and the horizontal radius of the downstream face of the dam increases downwardly for approximately the first 22.5 feet, or 75% of the total height.

**12.** Neither the patentee nor the owners of the patent in suit have ever constructed, caused to be constructed, or licensed others to construct a dam in accordance with the principles as disclosed by the patent in suit, and no actual

reduction to practice of the structure disclosed in the patent in suit has ever been made by the patentee or the owners of the patent.

**13.** A dam known as the Coolidge Dam was constructed across the Gila River in Arizona by the United States Bureau of Indian Affairs, Irrigation Service.

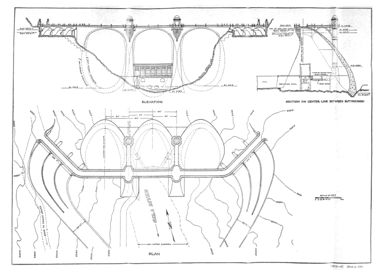
Bids and specifications for the construction of this dam were published and advertised in September of 1926; the contract for its construction was executed December 21, 1926; the first concrete was placed January 1, 1927, and the dam was substantially completed September 30, 1928.

The constructional details are illustrated and described in the advertisement, proposal, specifications, and drawings of the Coolidge Dam, San Carlos Project, Arizona, a pamphlet issued by the Department of the Interior, Bureau of Indian Affairs.

A copy of said pamphlet, plaintiffs' exhibit 2, is by reference made a part of this finding.

**14.** The Coolidge Dam is of relatively large size, the same having a height of approximately 250 feet above the river bed, and the width of the river canyon spanned by the dam approximately 540 feet. The crest of the dam carries a 30-foot roadway which is part of a national highway. The main or essential constructional details of the dam are illustrated in the attached drawings of the elevation, plan, and section on center line between the buttresses.

As disclosed in these drawings, the dam is in three spans of approximately similar construction; each span is approximately 180 ft. wide and the three spans are formed by two massive buttresses or piers erected in the river bed. Each buttress is approximately 225 ft. in height and approximately 258 ft. thick in an up-and-downstream direction at its base, said thickness decreasing upwardly; each buttress is approximately 150 to 180 ft. wide at the base on the upstream face and is approximately 72 ft. wide at the downstream face. The widths of these buttresses diminish upwardly to 60 ft. in width near the top on the downstream face and slightly more than 60 ft. near the top of the upstream face. The three 180-foot spans formed between the two buttresses and between each buttress and adjacent bank



ELEVATION
SECTION ON CENTER LINE BETWEEN BUTTRESSES
TOP OF SPILLWAY GATES
SPILLWAY CREST
CENTER LINE OF DOME
FLOOR OF POWER HOUSE
FILL
RETAINING WALL
PLAN
LOW WATER CHANNEL
SCALE OF FEET



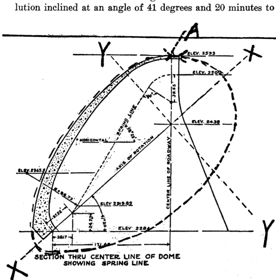
or canyon wall are closed by three similar domes which are egg-shaped in contour, the center dome being supported by the two buttresses and the two outer domes each being supported by one of the buttresses and adjacent canyon wall.

**15.** The spheroidal shape or contour of the domes used in the Coolidge Dam originated from the normal shape of a hen's egg, the shell of which by virtue of its shape possesses relatively great strength with respect to the thinness of its walls.

Illustrated below is a figure taken from plate 5 of plaintiffs' exhibit 2 showing a section through the center line of a dome.

To this figure has been added in dotted lines the total spheroidal contour in order to better visualize the egg-shape of the dome.

The dome surfaces are arranged with their axes of revolution inclined at an angle of 41 degrees and 20 minutes to




SECTION THRU CENTER LINE OF DOME
SHOWING SPRING LINE

the horizontal, *and with the smaller end of the egg-shape at the base.*

The upper part of the dome surface lies substantially in a horizontal plane, this portion, as indicated in the drawing by the reference character A, receiving no water pressure but being designed as an arch-section to support the roadway.

The upstream or water pressure faces of the domes are curved in all directions and no approximately straight line can be drawn upon or lie within the faces in any direction, nor can an approximately straight line be drawn upon or lie within the upstream face of the domes from any point in the crown and in a vertical plane to the base.

**16.** The line YY indicates the maximum diameter of the spheroidal figure shown in connection with finding 15. This line intersects the upstream face of the dam dome section at a point approximately 70 feet from the roadway measured along the upstream surface of the dam. The intersection of the maximum diameter YY with the upstream face of the dam occurs at approximately elevation 2,505; the top of the dam is elevation 2,533, and the bottom of the dam is elevation 2,284. The point of maximum radius is therefore 221 feet above the bottom of the dam, which, expressed in percentage, is 88.7% of the total vertical height of the dam. The remaining distance of the intersection from the point of maximum radius to the top of the dam or roadway is 28 feet or, expressed in percentage, 11.3% of the total vertical height of the dam.

**17.** The upstream surfaces of the domes are surfaces of revolution with the axes of revolution of the domes inclined at an angle of 41 degrees and 20 minutes. Only planes which are at right angles or normal to the axes of revolution and which therefore are inclined to the horizontal at an angle of 48 degrees and 40 minutes, will intersect the upstream surface of the domes in such manner as to produce a circular curve having *a radius*. The circular curves or curvatures thus produced by the intersection of these planes are not horizontal curvatures. Any horizontal curvatures produced by intersecting either the upstream or down-

stream of the dome surfaces by horizontal planes are compound curves which do not possess a single radius but instead have *a plurality of radii.*

**18.** The downstream face or inner surface of the domes is not a surface of revolution, the curvature of this surface being compound or three-centered as shown in the series of drawings showing sections normal to the axis of rotation, which drawings are defendant's exhibit 8 and are by reference made a part of this finding.

**19.** From elevation 2505 (point of maximum radius) to the bottom of the dam or 88.7% of the total height of the dam, the horizontal curvatures of the upstream and downstream dome surfaces not only differ from the disclosure of the patent in suit, in that the horizontal curvature is a compound curvature and therefore does not possess a single radius, but the horizontal curvatures of both the upstream and downstream faces of the domes increase or become more abrupt progressively downward, the radii for this portion thereby *decreasing* downwardly.

From the crest or roadway of the dam down to the point of maximum radius, which is 11.3% of the total height of the dam, the compound horizontal curvatures of both the upstream and downstream faces closely approximate circular curvatures and through this portion of the dam the radius of these horizontal curvatures increases downwardly.

**20.** Plaintiffs through their attorney notified the Department of the Interior in a letter dated September 21, 1928, of the existence of the Binckley patent in suit, inclosing a copy thereof in said letter and calling attention to the alleged infringement thereof by the construction of the Coolidge Dam. The receipt of this letter was acknowledged by the Office of the Secretary of the Interior on October 1, 1928, and these papers which are plaintiffs' exhibit 7 are by reference made a part of this finding.

**21.** More than two years prior to the filing of the application which matured into the patent in suit, the following United States letters patent had been issued:

W. Schmolz, #165371, patented July 6, 1875;
J. D. Derry, #474988, patented May 17, 1892;

F. H. Bainbridge, #525834, patented September 11, 1894; and

G. E. Ladshaw, #828752, patented August 14, 1906.

Copies of these patents, defendant's exhibits 20, 22, 18, and 19, are by reference made a part of this finding.

22. The patent to Schmolz discloses a dam which is curved or arched against the force or pressure of the stream and which in its preferred form is stated to be in the arc of a circle or elliptic curve with its convex side toward the stream. The form of dam disclosed in this patent has an upstream face the radius of the horizontal curvatures increasing downwardly through the entire height thereof.

The patents to Derry, Bainbridge, and Ladshaw all disclose an arch-type of dam in which the arches either form a portion of the surface of a cylinder which may have a downstream inclination or in which the radii may increase in length from below upward.

23. A publication known as "Transactions of the American Society of Civil Engineers, Vol. 53, December 1904", deposited in the Library of Congress February 16, 1905, contains an article entitled "Lake Cheesman Dam and Reservoir."

This article describes and illustrates in detail the calculations and construction of a dam referred to as the six-mile creek dam located at Ithaca, N. Y.

The illustrated disclosure has reference to:

(*a*) The proposed main dam construction;

(*b*) A modified form of the main dam, referred to in the article under the subtitle "The Dam as Built";

(*c*) The lower dam.

A copy of this article or paper which was presented at a meeting of the society on May 4, 1904, paper 981, defendant's exhibit D–21, is by reference made a part of this finding.

(a) THE PROPOSED MAIN DAM CONSTRUCTION

24. The proposed main dam construction described by the article referred to in the previous finding, an illustrated dimensional drawing of which appears on page 186 of defendant's exhibit D–21, comprises a dam of relatively thin construction and of dome-like formation similar to

the Coolidge Dam in that its major surfaces are curved in two directions. It is stated with reference to this form of design that "recourse was had to a design similar to that introduced in an *egg-ended boiler.*"

The dam structure described comprises a shell-like concrete dam approximately 7 feet 9 inches thick at its base and tapering to approximately 1 foot in thickness at its top, the total height of the dam from river bed to crest being 90 feet. The upstream and downstream faces of the dam are surfaces of revolution the axes of which are vertical. Any horizontal curvature existent in the structure is therefore a circular curve having a single radius.

The description of the dam includes the statement: "From 250.10 to 254.25 it is a segment of a ring, and from 254.25 to the crest at 260.0 *it is a segment of a conical dome.*" [Italics ours.] The radii of the extrados or upstream face are shown on the left of the section, and of the intrados on the right. The maximum radius of the extrados was 67.75 feet and that of the crest 50 feet.

At elevation 260, which is practically the crest of the dam, the upstream radius is 51 feet and the downstream radius is 50 feet. Three feet below the crest the upstream radius is 54.0 feet and the downstream radius is 52.0 feet. The radius of the horizontal curvatures of both the upstream face and the downstream face increases downwardly until at elevation 213, which is approximately 47 feet below the crest of the dam, the radius of the downstream face becomes 58 feet. From this point down to elevation 193 or 67 feet below the crest, the radius of the horizontal curvatures of the upstream face of the dam continues to increase until it reaches a value of 67.75 feet. The radius of the horizontal curvatures of the upstream face of the dam therefore increases downwardly for approximately 74 percent of the height of the dam, and increases downwardly for the downstream face of the dam for 52 percent of the height of the dam.

(b) THE MODIFIED FORM OF THE MAIN DAM

25. The article states that the dam instead of being constructed in accordance with the original designs and calculations was built only to a height of approximately 31 feet.

The upper portion of the dam, or that from elevation 193 to elevation 201, is illustrated in dotted lines with the accompanying legend "top of present dam" in the drawings on page 186 of defendant's exhibit D-21. While the values of radii are not numerically given, this drawing discloses to those skilled in the art that the upper portion of the dam comprising some 8 feet or approximately 25 percent of the dam, is of conoidal form with the radius of horizontal curvatures of both the upstream face and the downstream face increasing downwardly.

A section of the drawing of the modified dam and an illustration thereof appear in an article on the dam published in the Engineering Record, vol. XLIX, January–June 1904.

A photostat copy of this publication, defendant's exhibit D-23, is by reference made a part of this finding, and an enlarged photograph which is a duplicate of the illustration of the dam appearing in this publication, defendant's exhibit D-35, is by reference made a part of this finding.

(C) THE LOWER DAM

**26.** The article, in defendant's exhibit D-21, states on page 187 as follows:

> As a further protection to the bottom, and also to insure a uniform upward thrust at *b r*, whether the pond were full or in flood, a second dam, 15 ft. high, was to be constructed about the middle of the gorge, 170 ft. downstream from the main dam, the overfall from which would be received in a pool formed by the old low dam already mentioned, which is 210 ft. farther downstream. This lower or middle dam was to be a *segment of a frustum of a cone* with a crest radius of 60 ft. [Italics ours.]

The cross-section of this dam is shown in Fig. 30 on page 186 of defendant's exhibit D-21. The radius of the upstream face at the crest is given as 60 feet and the radius of the downstream face at the crest is given as 58 feet. The radius of the upstream face at the base of the dam is 68 feet and of the downstream face of the dam is 64 feet. The cross-section and radii given in Fig. 30 disclose a dam structure in which the radius of the horizontal curvature

increases downwardly in both the upstream face and the downstream face throughout the entire height of the dam.

27. As is exemplified by the publications set forth in detail in findings 23 to 26, inclusive, those skilled in the art possessed knowledge more than two years prior to the filing of the patent application which matured into the patent in suit, of a dam of a cone or conoidal form with its upstream face convex and its downstream face concave, and having a horizontal circular curvature, the radius of each face of which increases downwardly through a portion of the height thereof.

28. A publication entitled "Verbauung Der Wildbäche Aufforstung Und Berasung Der Gebirgsgründe", was published in Vienna in 1884, a copy of the same being filed in the Library of the Department of Agriculture, July 6, 1891. This publication described a dam known as the Pontalto Dam located on the Fersina Creek near the city of Trento, Italy. This dam, as described in this publication and as shown by drawings contained therein, is a circular-arch-dam built in a canyon the walls of which are almost vertical. The dam is described as being built in various sections at various times.

Different radii are used for the various sections, the upstream face of the dam sections are convex, and as shown in the article there are four horizontal cross-sections. At the lowest section of the dam the upstream radius is 49.8 feet and the downstream radius is 43.3 feet. The next section of the dam has an upstream radius of 56.4 feet and a downstream radius of 43.3 feet.

The next highest section of the dam has an upstream radius of 54.2 feet and a downstream radius of 39.7 feet.

The top section of the dam is shown as having an upstream radius of 50.6 feet and a downstream radius of approximately 36.1 feet.

The Pontalto Dam, as described in this publication, is a dam having a horizontal curvature the radius of each face increasing downwardly through three of the four sections.

A photostat copy of this publication, defendant's exhibit D-24, and a translation thereof, defendant's exhibit D-24a, are by reference made a part of this finding.

The court decided that the invention covered by the patent in suit was anticipated in the prior art and the patent therefore invalid, and that plaintiff was therefore not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The letters-patent #1081199 involved in this case were granted on December 9, 1913, upon an application filed therefor July 12, 1909. The applicant was George Sydney Binckley, a citizen of the United States, and soon after filing his application he assigned to Tracy C. Becker and Raymond Ives Blakeslee each a one-third interest therein. These three plaintiffs jointly prosecute this suit, alleging that the United States, in the construction of the Coolidge Dam in Arizona, infringed their patent rights.

It is common knowledge that a dam "is an artificial barrier", designed to forestall the flow of a stream, confine the same within limits, and thereby raise its level. Pools of varying levels are created by the upstream surface of the dam and the water of the stream brought as far as may be under control at the point of its construction. It has long been recognized that two general types of dam construction prevail; they are known as the gravity and the arch dam.

A gravity dam, as its name indicates, is one, as a matter of short description, which is held in place by gravity. It is composed of earth, masonry, or concrete, with an inclined downstream face and a vertical or inclined upstream face. The arch type is, as its name indicates, a curved structure generally constructed of masonry or concrete, with its convex surface upstream. This type, if a single arch one, is held in place by abutments or buttresses on either side of the stream to be dammed, and, in the event of a multiplicity of arches, the dam stresses "are transmitted to a plurality of abutments or buttresses across the stream."

It is at once apparent that the type of dam construction is dependent upon the existing situation at the stream where it is to be constructed. Whether the type to be adopted shall be one or the other, or partake of characteristics common to both of the types mentioned, is determinable from

Opinion of the Court

the existing factors of width of stream, necessary height, inherent character of foundation on which to rest the same, materials to be used, and additional elements present at the site of the work. There is no one type which will universally meet all locations, or rigidly fix the character of materials to be used.

The art exacts of skillful engineers a comprehension of the stresses of impounded water against the upstream surface of the dam, fraught with the menace of the ever-present tendency to overturn the structure or move it bodily downstream. Towards overcoming the matter of expense involved, as well as increasing the stability and strength of dams, the progress of the art from the old to the new types now in existence constitutes a rapid advance as disclosed by the art itself.

The patent in suit contains a single claim. It is manifest from the specifications that the inventor was striving to create a form of dam construction which would not only effectually withstand the pressure of the impounded water against its upstream face but also result in a structure of much diminished transverse dimensions which would materially lessen the cost thereof, and due to its peculiar form of construction employ the impounded water in aid of its stability. A "shell-like" structure was one and the principal feature of the invention. Doing away with the massive formations previously adopted was a claimed advance in the art.

The patentee filed his application on July 12, 1909, and thereafter it encountered many difficulties from Patent Office actions. Six claims appear in the original application (Finding 3). These claims are expressly limited to a dam having a conoidal surface opposed to the service pressure thereon, i. e., the claims cover the contour and disclosed form of construction applied to the upstream face of the dam. The specifications state with reference to the illustrations inserted therein, "The forward face *c* has an increasing radius from the crown *a* toward the base *b*."

The specifications and claims clearly disclose the application of the principle of a conoidal surfaced upstream face of a dam throughout its entire height from its crown to its

base. As to "the rearward face *d* of the dam [it] may be of any predetermined and desired formation in conformity with the massing of the constituent material of the dam between the faces *c* and *d*."

The advantages claimed to accrue from this type of construction disclosed in the specifications are first, a substantial reduction of the transverse dimensions of the dam, i. e., the erection of a more or less "shell-like" structure, eliminating to a great extent the massive characteristics of the old form and saving in the cost thereof, and, second, the use of the pressure of the impounded water to add to and effectually secure the stability of the structure, forestall its overturning and consequent demolition. By conceiving the cone or conoid principle in dam construction the inventor claims to have introduced into the art a new and novel utilization of said principle.

The Patent Office, citing prior art, rejected all six claims of the application, and the applicant acquiesced in this office action. Subsequently five of the claims were amended by the applicant, and again all six were rejected upon cited prior art, and again the applicant acquiesced in this office action by cancelling all his claims, and filing one claim as a substitute. This one claim reads as follows:

> A dam having a horizontal curvature the radius of each face of which increases downwardly.

A patent to one Schmolz was cited as anticipatory of the claim by the Examiner, and it too was rejected.

Finally the applicant, acquiescing in all previous rejections, filed the following single claim as amendatory of the last rejection:

> A dam having a horizontal curvature the radius of each face of which increases downwardly through a portion of the height thereof,

and upon this claim the patentee relies to establish infringement by the United States.

In the light of Patent Office actions and the applicant's acquiescence to the same, the crucial question arises, i. e. What did the patentee invent? The adaptation of the cone or conoidal principles to dam construction was old. The

patentee did not originally claim said principles in any novel way sufficient to escape the citations of prior art. Finally forced to cancel the broad claims of his original application, he limits the invention to the application of the cone or conoidal principles of dam construction to each face of the dam and extends it downwardly, each face of the curvature to possess an increasing radius through a portion of the height of the dam.

The above statement is amply supported by the record. Plaintiff Binckley's original claims do not speak of a laterally curved and vertically inclined surface having a downwardly increasing radius opposed to the service pressure thereon. The disclosure is confined to the contour of the upstream face of the dam, and clearly describes the application of the cone or conoidal principle of construction to this face of the dam without detailed specification as to an increasing radius applicable to the same.

"The invention", as the specifications state, "consists in the novel utilization of the principle of the cone or conoid in dam construction, and embodied in the provision, formation, construction and combination of parts and features all as hereinafter described, shown in the drawing and finally pointed out in claim."

The drawings, specifications, and original claims negative a conception of the cone or conoidal principle of dam construction as applicable in any other way than "the general form of a truncated fragmentary cone or conoid", as illustrated in Findings 8 and 9 and described in Finding 10.

The inventor did not originally conceive or disclose a form of dam construction embodying a plurality of curvatures of varying radii going to make up the upstream face of the dam. On the contrary, Fig. 2 of the specifications discloses no more than, as stated, "approximately the arc of a circle having its center downstream." The principle of conoidal formation of the upstream face of the dam originally disclosed comprehended "a laterally curved and vertically inclined" upstream face of dam extending from bank to bank of the stream, its contour varying only in accord with the transverse dimensions of the structure itself.

To meet the references of the Patent Office which had resulted in the rejection of all of the original claims five of them were amended by the applicant. The amendments of three of the claims disclosed for the first time the adaptation of the conoidal principle to the upstream face of the dam "*having a downwardly increasing radius.*" As to another claim, the amendment inserted simply sought to more specifically point out the precise formation of the conoidal dam. Originally the applicant had claimed "a fragmentary conoidal dam having an inclined and curved surface opposed to the service pressure." The chosen amendment claimed "A fragmentary *upright* conoidal dam, etc.", and the final amendment resulted in a claim for dam construction wherein the curving between the banks of the stream was to possess "a varying radius."

The departure sought from the original claims by the above amendments was to embrace within the invention not only the original principles of curvature or conoidal formation for the upstream face of a dam, but in addition thereto increase the radius of the curvature downwardly. In other words, the novelty claimed consisted in a dam formation for the upstream face of the same wherein its cone-shaped surface would increase in radius from its crown downwardly. All that the amendments accomplished was, to say the most, a change from the general characteristics of an arc of a circle to precisely the identical formation with proportionately increasing radius as construction proceeded from the crown of the dam downwardly.

As previously observed, the amended claims of the inventor were rejected by the Patent Office on prior art references, and by successive rejections of claims, in which the applicant acquiesced, the field for invention, predicated upon a new and novel utilization of the cone or conoidal formation in dam construction, was decidedly restricted. The applicant had directed his efforts toward the formation of the upstream face of a dam, and in order to differentiate from cited references all previous claims were canceled by him and a single one substituted.

The first substituted claim did no more than apply the principles of cone or conoidal construction to both the up and downstream faces of a dam, giving to each a downwardly increasing radius. It would be difficult to ascribe novelty to the subject-matter of this claim even in the absence of prior art references. However, the Patent Office rejected the claim and thereafter the plaintiff Binckley was granted the patent in suit which contains the one amended claim now relied upon to establish infringement.

The Supreme Court in numerous decisions holds that when an applicant for a patent acquiesces in the rejection of his claims by the Patent Office he is "estopped to claim the benefit of his rejected claim or such a construction of his present claim as would be equivalent thereto." *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, 429, and authorities therein cited. The application of this rule to the patent in suit restricts the granted patent to an adaptation of the cone or conoidal form of construction wherein the radius or radii of the curvature or curvatures increase downwardly through *only a portion* of the height of the dam.

There has never been any actual reduction to practice of the patent in suit either by the patentee or anyone else. The court has found as a fact that the phraseology of the claim is ambiguous to those skilled in the art. The specifications do not disclose or teach the meaning of the words "through a portion of the height thereof." It is true Fig. 1 of the drawings discloses a dam of 30 feet in height and the horizontal radius of the downstream face increases downwardly approximately 22.5 feet or about 75% of the dam's total height.

A general statement such as herein involved, which obviously comprehends either a maximum or minimum increase in the radius of the curvatures of both faces of the dam so long as any portion of the structure remains unaffected thereby, leaves those skilled in the art in ignorance as to just how they may proceed in dam construction without incurring the consequences of infringement. What portion, the upper, the center, or the lower, is to be increased

in radius? What proportion of the height of the dam constitutes a portion? The specifications state

> The rearward face *d* of the dam may be of any predetermined and desired formation in conformity with the massing of the constituent material of the dam between the faces *c* and *d*,

notwithstanding the claim itself limits the formation of both faces to identical forms of construction.

It is difficult to follow plaintiffs' contention that the patent in suit embodies a form of dam construction which in a large measure minimizes the cost of the same when compared with what is termed a standard practice in the art. The plaintiff Binckley in his original application emphasized the substantial saving in cost resulting from the adoption of his then broad claims, and this novel feature of the patent continues in the specifications, attributing the result to the final amended claim as well as to the original ones eventually canceled.

If the original claims were designed to cover a form of construction which did result in saving in the cost thereof, that feature of the invention was old. The adaptation of the cone or conoidal principles to dam construction was old, and inherent therein was and obviously is the feature of economy in construction. We have no facts of record which from a probative point of view establish the fact that the increasing of the radius or radii of the curvature or curvatures of a dam through a portion of the height thereof materially increases the saving in the cost over a cone or conoidal form employed without variation in radius through the entire height of the dam. One, so far as this record is concerned, is the equal of the other, and manifestly the latest one presents nothing new.

The plaintiffs introduced evidence to establish the fact that in numerous instances of dam construction wherein the "standard practice" had been employed the cost was in excess of what it would have been had the patent in suit been adopted. Aside from the long since and well established engineering principles in the art no standard practice with respect to dam construction prevails. The various

and always differing local conditions render it impossible to compare with any degree of accuracy the cost of one dam with another. Too many factors enter into the issue to predicate uniformity of cost or design (Finding 5).

Patent monopoly is granted upon the claims. Under the statute the claims define the invention. An analysis of the claim in suit, in the light of its development, and the specifications of the application upon which it was allowed leads inevitably to the conclusion that it does not define invention. The addition of an indefinite phrase to a rejected claim, which does not in any way result in some functional advancement, will not save the same from a contention that it is invalid.

The specifications point out no advantage to accrue from a conoidal form of dam construction wherein the radius of the same increases downwardly through a portion of the height of the dam. The patent signally fails to teach those skilled in the art wherein the subject-matter of the claim applied to dam construction will function in any respect differently from what was originally claimed as novel and rejected as old.

The principles of conoidal formations disclosed in the patentee's specifications and the novelty claimed in their adaptation to dam construction are not changed in character or made to function in such a way as to accord to the user a single advantage in any respect, which would not obtain without the amendment to the one claim in suit. The record establishes this fact. A modification of an existing form of dam construction which brings about no new results is not invention.

The patentee having voluntarily canceled certain claims and amended a substituted one to meet repeated rejections of the same by the Patent Office upon references to the prior art, subjects his claim, when challenged as to validity, to a strict construction, and whatever elements of the invention the patentee relinquished are effectually eliminated from the patent. *John I. Paulding, Inc.*, v. *Leviton*, 45 Fed. (2d) 125; *I. T. S. Co.* v. *Essex Co.*, 272 U. S. 429. The evidence in the case not only negatives the existence of

novelty in the introduction of conoidal formations with increasing radius through a portion of the height of the dam applicable to each face thereof, but preponderates in establishing the fact that it fails to accomplish what it was designed to accomplish as set forth in the patent specifications.

PRIOR ART

It is not essential to discuss in detail all prior art patents cited in the record. We are convinced that two citations completely anticipate the patent in suit. What may be conveniently designated as the Ithaca dam is disclosed in a publication known as Transactions of the American Society of Civil Engineers, published in 1904, and thereafter on February 16, 1905, deposited in the Library of Congress. Findings 23, 24, 25, 26, and 27 depict in dimensional detail the exact structure embodied in the dam formation set forth in the publication. Beyond a doubt, Finding 27 is sustained by the record.

Counsel for plaintiffs very vigorously challenge the availability of the publication mentioned in Finding 13 as a reference. The Ithaca Dam project is characterized as a "dream, which finds its theoretical and empirical speculations embodied in the proceedings of a certain engineering society to which the public has had no usual and suggested access." Again it is averred that no such dam was ever built because of a protest against its installation, and in any event whatever occurred resulted in an abandoned experiment, abandoned because of its dangerous character.

Whether the Ithaca dam was or was not built is unimportant. The defense relied upon is prior publication (Finding 27). The plaintiffs seemingly overlook the fact that Binckley did not build a dam in accord with his patent, and, so far as this record discloses, no one else applied it to dam construction. The patent was nearly thirteen years old when the contract for the Coolidge Dam was let.

While non-user will not deprive the owner of patent rights, it does under certain circumstances preclude a broad construction of the patent claims. *Westinghouse Electric &*

*Mfg. Co.* v. *Toledo P. C. & L. Ry. Co.*, 172 Fed. 371. This is the extent of the rule as applicable to patented invention, and manifestly reference to it to discredit a prior publication is inapposite. See also *Hartford Empire Co.* v. *Obear Nester Glass Co.*, 51 Fed. (2nd) 85, 91.

In the case of *Thacher* v. *Inhabitants of Town of Falmouth*, 235 Fed. 151, 158, the court said:

> The question in each is whether sufficient information is given to enable one skilled in the art to make and use the invention disclosed. It is not necessary to show that the device illustrated has been in use, if the publication is made and the information conveyed to the public is sufficient. As bearing on this question the publication is not invalidated by the fact that it was made for the purpose of giving the result of a series of tests. Courts have discredited works of experimentation by patentees, because experiments are made, not for the purpose of commercial use, but merely to see whether the inventors making the experiments will apply for a patent. What the courts have said upon this subject bears upon the question of public use, and does not apply to a case where the court is seeking to find whether an alleged improvement has been discovered in a printed publication. In Walker on Patents (4th Ed.) § 95 et seq., and cases cited thereunder, is found a discussion of the effect of experimental use as opposed to public use; but this has nothing to do in deciding whether a patentee's alleged invention "was described in any printed publication in this or any foreign country before his invention or discovery thereof." (Affirmed 241 Fed. 869.)

Just why the publication should be designated as speculative and theoretical is not apparent from the record. The Engineering Society which published it was founded in 1852, and the publication itself in most careful dimensional detail, with added illustrations, sets forth for the benefit of those skilled in the art a type of cone or conoidal dam construction identical in all respects to plaintiff Binckley's application. This publication teaches the adaptation of cone or conoidal formations in dam construction. It was filed for copyright purposes in the Congressional Library subsequent to publication, with permission granted to

others to reprint the same provided only the title of the paper and the name of the author be given. *Berlinger* v. *Busch Jewelry Co.*, 48 Fed. (2d) 812, *Jockmus* v. *Leviton*, 28 Fed. (2d) 812.

In Robinson on Patents, Vol. 1, pp. 446, 447, five essential elements are set forth apropos the defense of prior publication:

> To have this effect the publication must be: (1) A work of public character, intended for general use; (2) Within reach of the public; (3) Published before the date of the later invention; (4) A description of the same complete and operative art or instrument; and (5) So precise and so particular that any person skilled in the art to which the invention belongs can construct and operate it without experiments and without further exercise of inventive skill. Unless a publication possesses all these characteristics it does not place the invention in the possession of the public, nor defeat the claim of its re-inventor to a patent.

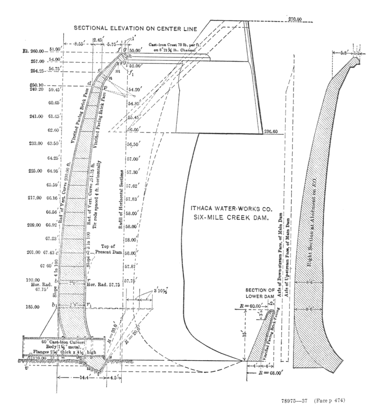
Doubtless the plaintiffs rely upon the last element to sustain the contention that the publication cited does not meet the requirements of the established rules.

The prior publication of the Engineering Society is complete in every detail. Pressure stresses are computed and the illustration, facing this page, discloses a dimensional form of construction infinitely more in detail and preciseness than found in the specifications of the ordinary patent application. The article is exhaustive and teaches a form of dam construction which coincides with remarkable exactness to the specifications and claim of the patent in suit.

Prior patents in the art are cited in Finding 21. To discuss them in view of what has been said with respect to a prior publication would serve only to prolong this opinion. They are set forth in the findings and available as prior art.

Additional defenses are interposed. We do not refer to them for the court's view of the case is expressed in what has been said. The petition will be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.



SECTIONAL ELEVATION ON CENTER LINE
ITHACA WATER-WORKS CO.
SIX-MILE CREEK DAM.
Cast-iron Crest 70 lb. per ft. on 8" 21¼ lb. Channel
Vitrified Paving Brick Face
Rad. of Vert. Curve 200.00 ft.
Rad. of Vert. Curve 251.75 ft.
Tie rods spaced 4 ft. horizontally
Radii of Horizontal Sections
Top of Present Dam
Slope 3 in 100
Slope 4 in 100
Hor. Rad. 67.75'
Hor. Rad. 57.75
60" Cast-iron Culvert
Body 1½" metal,
Flanges 2½" thick x 4½" high
SECTION OF LOWER DAM
Vitrified Paving Brick Facing
Axis of Down-stream Face, of Main Dam
Axis of Up-stream Face, of Main Dam
Right Section at Abutment on EO
El. 260.00
257.00
254.25
250.10
249.20
241.00
233.00
225.00
217.00
209.00
201.00
193.00
185.00
270.00
236.60
R = 60.00'
R = 68.00'
R = 20.0'
R = 50.0'
14.4'
4.5'



# BURDINE C. ANDERSON, JAMES E. ANDERSON, FRANK C. ANDERSON, WILLIAM LELAND ANDERSON, ROBERT S. ANDERSON, AND MONROE D. ANDERSON, AS TRUSTEES FOR THOMAS D. ANDERSON, AND MONROE D. ANDERSON AS TRUSTEE FOR BENJAMIN M. ANDERSON, v. THE UNITED STATES

[No. M-111. Decided June 1, 1936]

*On the Proofs*

*Income tax; validity of assessment; entry of tax as on income of taxpayer, deceased, instead of as against executor.*—An additional assessment of income tax in 1926 on 1920 income of the taxpayer, Frank E. Anderson, who deceased in 1924, was not invalid because entered on the supplemental page attached to the Commissioner's assessment list as additional tax for 1920 in respect of the income of "Anderson, Frank E., Dec'd, C/o M. D. Anderson, Exec.", instead of being entered thereon as due and collectible from the estate of Frank E. Anderson, deceased.

*Extension of assessment period by deficiency notice; extension of collection period by Revenue Act of 1926.*—Sections 274, 277, and 280 of the Revenue Act of 1924 were applicable to deficiencies in taxes for years prior to 1924; and where, prior to the expiration of the statutory 5-year period for assessment, the Commissioner of Internal Revenue gave the taxpayer a 60-day deficiency notice for the year 1920 from which no appeal was taken to the Board of Tax Appeals, the 5-year period for assessment was, under section 274 (b) of said act, extended an additional 60 days, and assessment of the deficiency during the extended period therefore a valid assessment, which, under the Revenue Act of 1926, was collectible within 6 years after being made.

See also *Anderson, et al.* v. *United States, post*, page 561.

*The Reporter's* statement of the case:

*Mr. R. C. Fulbright* and *Mr. Chase Morsey* for the plaintiffs. *Fulbright, Crooker & Freeman* were on the brief.

*Mr. John A. Rees*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

Reporter's Statement of the Case

Plaintiffs sue to recover $188,948.03, income tax paid in respect of the net income of Frank E. Anderson for 1920. Anderson died December 15, 1924, and the additional tax in question was collected May 12, 1926, from his executor, M. D. Anderson.

Plaintiffs contend (1) that the assessment of the tax in question on April 7, 1926, and the notice and demand for payment thereof on April 28, 1926, were illegal and invalid for the reason that the assessment of the additional tax was made against Frank E. Anderson after his death rather than against the estate or the executor thereof, as, it is alleged, was required by law; (2) that the period of limitation of five years for assessment and collection of any additional tax for 1920 expired under section 277 (a) (3) of the Revenue Act of 1926 on March 14, 1926, the 1920 return having been filed March 14, 1921; and (3) that the sixty-day deficiency notice mailed by the Commissioner on December 3, 1925, to the executor with reference to the additional tax for 1920 subsequently assessed on April 7, 1926, did not serve to extend for sixty days the period in which assessment could be made for the reason that this deficiency notice was issued under the provisions of section 274 (a) of the Revenue Act of 1924, which section was repealed by section 1200 (a) of the Revenue Act of 1926, and that sections 277 and 280 of the Revenue Act of 1924 did not, at the time the tax was assessed, give the Commissioner an additional sixty days after the expiration of the specified period of five years after the return was filed in respect of the deficiency determined for years prior to 1924.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Frank E. Anderson was a citizen and a resident of Oklahoma City, Oklahoma, from 1900 to December 15, 1924, the date of his death. He died testate and shortly after his death M. D. Anderson was appointed executor of his estate. On or shortly after the appointment of M. D. Anderson as executor, he filed with the collector a "Preliminary Notice—Estate of Resident" as required by section 304 (a) of the

revenue act of 1924, which gave notice to the collector of the death of Frank E. Anderson, the appointment of M. D. Anderson as executor, and the estimated value of Frank E. Anderson's property for estate tax purposes. The notice was received by the collector January 23, 1925.

2. The estate of Frank E. Anderson was finally closed April 16, 1934, and distribution made on that date, in accordance with the terms of the will, to the decedent's wife, Burdine C. Anderson, and their six sons, all of whom are plaintiffs in this action.

3. March 14, 1921, Frank E. Anderson filed his return for the calendar year 1920 reporting a total net income from all sources of $602,455.05 and showing a tax liability of $376,813.52, which was paid on or before December 15, 1921.

March 23, 1921, Frank E. Anderson filed an amended return for 1920 showing a total net income of $601,110.24, and a total tax liability of $375,845.12. May 24, 1921, he filed a claim for abatement of $968.40, representing the difference between the tax shown due on the original return, $376,-813.52, and that shown on the amended return of $375,-845.12. Thereafter the Commissioner of Internal Revenue issued a certificate of overassessment in the amount set out in the above claim and that amount is not in controversy in this suit.

4. December 3, 1925, the Commissioner forwarded to "Mr. M. D. Anderson, Executor, Estate of Frank E. Anderson, C/o Anderson, Clayton & Company, Houston, Texas", a sixty-day deficiency notice showing his determination of a deficiency of $448,230.64 for 1920 and proposing an overassessment of $262,407.94 for 1919. The letter set out that "In accordance with the provisions of section 274 of the Revenue Act of 1924, you are allowed sixty days from the date of mailing this letter within which to file an appeal contesting in whole or in part the correctness of this determination." This deficiency notice was mailed under and in accordance with the provisions of section 274 of the Revenue Act of 1924.

5. An assessment of $451,355.97, representing the deficiency of $448,230.64 for 1920, as set out in the Commissioner's letter of December 3, 1925, and referred to in

finding 4, plus interest of $3,125.33, was made by the Commissioner April 7, 1926. The Commissioner's assessment list which the Commissioner signed and on which this additional tax was assessed did not, as is always true in respect of additional assessment, contain the name of any taxpayer in respect of whose income additional assessments were made on such list. On the supplementary page prepared for use by the collector in keeping his records and attached to the Commissioner's assessment list, there was entered the amount of $451,355.97 as additional tax and interest for 1920 in respect of the income of "Anderson, Frank E., Dec'd., C/o M. D. Anderson, Exec., C/o Anderson, Clayton & Company, Houston, Texas."

**6.** April 13, 1926, the Commissioner approved and forwarded a schedule of overassessments to the collector for his action in accordance with the instructions appearing thereon, and showed thereon an overassessment in favor of "Anderson, Estate of Frank E.", of $262,407.94 for 1919. April 23, 1926, the collector returned the foregoing schedule of overassessments to the Commissioner with the schedule of refunds and credits on which it was shown that the overassessment in favor of the estate of Frank E. Anderson had been found to be an overpayment and had been applied as a credit against the deficiency of $451,355.97 (including interest) assessed for 1920, leaving a balance due of $188,948.03.

April 28, 1926, the collector mailed to M. D. Anderson, executor, estate of Frank E. Anderson, notice and demand for payment of $188,948.03, representing the balance of the deficiency for 1920 as set out in the preceding finding. That amount was paid by M. D. Anderson, executor, under protest May 12, 1926.

April 25, 1930, the executor filed a formal claim for refund of $451,355.97 for the calendar year 1920 and assigned as a basis therefor that the deficiency for 1920 had been assessed after the expiration of the statute of limitation applicable thereto. The Commissioner rejected this claim.

The court decided that plaintiffs were not entitled to recover.

Opinion of the Court

LITTLETON, *Judge*, delivered the opinion of the court:

In this case plaintiffs seek to recover $188,948.03 with interest, income tax assessed and collected in respect of the income of Frank E. Anderson for 1920. Anderson died December 15, 1924, and Monroe D. Anderson was duly appointed executor of his estate and acted as such executor from January 1925 until discharged, April 16, 1934, when the net estate was distributed to the present plaintiffs in this action. The total tax and interest assessed by the Commissioner in respect of the income of Frank E. Anderson for 1920 was $451,355.97, and $262,407.94 thereof was collected by a credit on April 16, 1926, of an overpayment in that amount in respect of the tax paid by Frank E. Anderson for 1919. The balance of $188,948.03 of the additional assessment made for 1920 was paid by the executor of the estate of Frank E. Anderson on May 12, 1926, pursuant to notice and demand by the collector. A claim for refund was filed and rejected, and this suit was instituted to recover the balance of $188,948.03 on the ground that it was barred by the statute of limitation for the reasons, first, that the assessment of the additional tax for 1920 was illegal and void because the amount of $451,355.97 of the total taxes assessed by the Commissioner on his assessment list signed April 7, 1926, was entered on the supplementary page attached to such assessment list as the tax due for 1920 in respect of the income for that year of "Anderson, Frank E., dec'd, C/o M. D. Anderson, Exec., C/o Anderson, Clayton & Company, Houston, Texas" instead of being listed on such supplementary page to the Commissioner's assessment list as being due and collectible from the "estate of Frank E. Anderson, deceased"; and, second, because the limitation period of five years after the return for 1920 was filed expired March 14, 1926, and the provisions of the revenue acts of 1924 and 1926 did not give the Commissioner an additional sixty days after the expiration of such five-year period by reason of the mailing by the Commissioner on December 3, 1925, of a deficiency notice under section 274 of the Revenue Act of 1924.

The contention that the assessment was illegal and void is denied on authority of *Burdine C. Anderson et al.* v. *United States*, No. 42472, decided this date (*Post*, p. 561). The statutory deficiency notice issued prior to assessment was mailed to the executor, and the estate of Frank E. Anderson, as the taxpayer, was afforded an opportunity through the executor to be heard before the Commissioner in respect of the deficiency for 1920 and to appeal to the United States Board of Tax Appeals. No appeal was taken. April 7, 1926, the Commissioner assessed the additional tax so determined in his sixty-day notice mailed under section 274 of the Revenue Act of 1924. This assessment was entered by the Commissioner on the supplementary page attached to his assessment list as payable by the executor of Frank E. Anderson, deceased. Upon receipt of such assessment list the collector served written notice and demand upon M. D. Anderson as executor of the estate of Frank E. Anderson for payment of the balance due. In these circumstances we are clear, as held in No. 42472, that the Commissioner's assessment of the additional tax in question was in all respects a valid and legal assessment. The tax assessed by the Commissioner was correct in amount and was for the proper year; it was computed and determined upon the income of the proper person, and notice and demand for the payment thereof was served upon the proper representative of the taxpayer responsible for payment and the amount was duly and properly paid. The fact that the Commissioner entered the amount assessed upon the supplementary page attached to his assessment list as being an additional tax for 1920 in respect of the income of Frank E. Anderson, deceased, % M. D. Anderson, Exec., instead of as an additional tax for 1920 collectible from the estate of Frank E. Anderson, did not affect the legality of the assessment, for either designation would have been correct. The Commissioner assesses *the tax*, and the amount assessed is a charge against the collector for which he must account. The designation on the supplementary page attached to the Commissioner's assessment list of the person in respect of whose income a tax was assessed or the person from whom

collection should be made is for the information and guidance of the collector, and if he proceeds in a proper and legal manner, as he did in this case, no valid objection to the assessment and collection can be made by the person responsible for the payment of the amount assessed and from whom such assessment was collected.

We cannot concur in the second contention that the tax was barred at the time it was assessed on April 7, 1926. Sections 274, 277, and 280 of the Revenue Act of 1924 were applicable to deficiencies in taxes determined by the Commissioner for years prior to 1924. When any such deficiency was determined by the Commissioner, he was required by section 274 to mail to the taxpayer by registered mail a notice thereof, and the taxpayer was given the right to take the case before the Board of Tax Appeals. In compliance with these sections, the Commissioner on December 3, 1925, in accordance with the provisions of section 274 of the 1924 act, mailed the 60-day deficiency notice to the executor of the estate of Frank E. Anderson. This clearly gave the Commissioner an additional sixty days after the expiration of the statutory period of five years from the date the return for 1920 was filed within which to assess the deficiency under the provisions of section 277 (b) which provided as follows:

> The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, * * *.

This language clearly fixed the period for assessment in this case at five years and sixty days. Inasmuch as the return for 1920 was filed March 14, 1921, and the deficiency notice was mailed on December 3, 1925, within five years thereafter, and no appeal was taken therefrom to the Board of Tax Appeals, the period within which the Commissioner was authorized to assess the tax did not expire until May 13, 1926. The assessment on April 7, 1926, was therefore timely,

and under the provisions of the Revenue Act of 1926, which was enacted on February 26, 1926, the Commissioner had six years thereafter within which to make collection.

Plaintiffs make the further contention that even if section 277 of the Revenue Act of 1924 gave the Commissioner five years and sixty days within which to assess the deficiency, the assessment was nevertheless barred when made for the reason that sections 274 and 277 of the Revenue Act of 1924 were repealed by section 1200 of the Revenue Act of 1926 and as the deficiency determined for 1920 was not assessed by the Commissioner until after the enactment of the Revenue Act of 1926 that the Commissioner had only five years, or until March 14, 1926, within which to make the assessment. We cannot agree with this contention, and we think no useful purpose would be served by a detailed discussion of the various provisions of the revenue acts of 1924 and 1926 on the subject. Section 1200 (b) clearly continued in force all the provisions of the Revenue Act of 1924 for the assessment and collection of all taxes, interest, and penalties imposed by prior revenue acts to the extent provided in the Revenue Act of 1924. The Revenue Act of 1926 granted a number of additional privileges to the Commissioner and the taxpayer in respect of deficiencies determined by the Commissioner after the passage of the Revenue Act of 1926 and in respect of cases then pending before the Board of Tax Appeals on deficiencies previously determined by the Commissioner. From a careful study of these provisions we fail to discover any language that would support the conclusion that it was intended by the Revenue Act of 1926 to take away from the Commissioner the additional sixty-day period provided in section 277 of the Revenue Act of 1924 in a case where a deficiency notice had been mailed under section 274 of the act of 1924 and no appeal had been taken to the Board.

The petition is dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

# JAMES S. DARCY ET AL., EXECUTORS, ESTATE OF JAMES TEMPLE GWATHMEY, v. THE UNITED STATES

[No. M-420. Decided June 1, 1936]

*On the Proofs*

*Estate and income taxes; income from deceased partner's interest in partnership continued after his death.*—Where pursuant to the partnership agreement a partnership, upon the death of one of the partners, continued on for the remainder of the partnership year, the income from the deceased partner's interest, after his death, was not a part of his estate subject to estate tax, but was income of his estate and subject as such, to income tax.

*Partnership profits taxable to partners whether distributed or not.*—Partnership profits are taxable as income to the individual partners whether actually distributed to them or not.

*Income tax; income from deceased partner's interest in continuing partnership; for what year taxable.*—Where a partnership, under the terms of the partnership agreement, was continued on after the death of one of the partners in June 1924, for the remainder of the partnership year ending August 31, 1924, and the profits from the deceased partner's interest in the partnership credited to his estate at the end of the year, the income of the estate from such profits was taxable as income for 1924, though the estate made its tax return on the calendar-year receipts and disbursement basis and such income was not actually received by it until in 1925.

*The Reporter's* statement of the case:

*Mr. Allen G. Gartner* for the plaintiffs.

*Mr. Joseph H. Sheppard*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

The court made special findings of fact as follows:

1. James Temple Gwathmey, a citizen of the United States and a resident of New York City (hereinafter sometimes referred to as the decedent), died June 11, 1924. He left a will naming, as executors, Gaines Gwathmey, Archibald Binford Gwathmey, Jr., Archibald Binford Gwathmey,

2nd, and James S. Darcy, to whom letters testamentary were issued July 26, 1924, and they are now the duly qualified executors of the decedent's estate and plaintiffs herein.

2. At the time of his death the decedent was a member of the partnership of George H. McFadden & Bro. with its principal office at Philadelphia, Pa., where it was engaged in business as cotton and merchandise brokers. The partnership operated on a fiscal year basis with such year ending August 31st. The articles of partnership which were in effect at the time of the decedent's death were entered into August 1, 1922, and by reference are made a part of this finding.

The articles of partnership read in part as follows:

> The parties hereto agree to form a partnership under the firm name of George H. McFadden & Bro., for the purpose of conducting the business of dealing in cotton and general merchandise, said partnership being entered into upon the understanding of all that they consider, as they always have done, that George H. McFadden, is, as he always has been, the absolute head of the house of George H. McFadden & Bro., and upon the understanding that when any difference of opinion shall arise between the members of the firm as to its policy or management, George H. McFadden's decision shall be absolute and final.
>
> * * * * *
>
> ARTICLE IV
>
> * * * * *
>
> The interest of J. Temple Gwathmey shall be limited solely to participation in the profits of the New York Office of George H. McFadden & Bro. to the extent of fifty per cent (50%) thereof. Said Gwathmey, as between the partners of George H. McFadden & Bro., shall be liable only for the losses of the New York Office of George H. McFadden & Bro. in the same proportion as he is entitled to share in said profits. Said Gwathmey shall have no interest or participation in the profits other than the above recited share of profits of the New York Office, nor in the assets, firm name, or good will of the firm of George H. McFadden & Bro. The amount of profits and losses and the amount of business of the New York Office of George H. McFadden

& Bro. shall be determined from time to time by the partners of George H. McFadden & Bro. other than said Gwathmey, and such determination shall be final and conclusive on the said Gwathmey.

* * * * *

ARTICLE VIII

In case of the death of one of the partners during the currency of any business year, his interest shall be continued until the expiration of said year, being credited with profits less withdrawals, or charged with losses plus withdrawals. At the expiration of said year the estate of said partner shall be credited with the amount which was to his credit at the last periodical ascertainment of values plus said profits less withdrawals, or minus said losses plus withdrawals.

If the business of the partnership be continued by some or all of the remaining partners by a firm composed of some or all of the remaining partners, either alone or in connection with others, the new firm shall put to the credit of the estate of the dead partner the amount thus ascertained, together with any interest upon his capital accruing since the last ascertainment of his contribution. The estate shall be a creditor of the new partnership and shall be entitled to be paid one-fifth in cash at the end of the business year and the residue in four equal annual installments, with interest at the rate of eight per centum (8%) per annum, payable quarterly.

The provision is upon the condition that in any new firm thus entitled to credit there shall be members of the old firm entitled to seventy per centum (70%) of the total amount to the credit of all the partners exclusive of the dead partner at the time of ascertainment of values at the expiration of the current year during which said partner died.

It shall be optional with the new firm to anticipate the payment of the whole or any part of the principal due to the deceased partners upon the expiration of thirty (30) days' notice to the personal representative of such deceased partners.

* * * * *

March 9, 1925, following decedent's death, pursuant to the terms of the partnership agreement referred to above,

the partnership determined the net amount of the decedent's interest in the partnership on that date (March 9, 1925) to be $181,775.28, which was arrived at in the following manner:

EXHIBIT A

*J. Temple Gwathmey, March 9, 1925*

| | | Dr. | Cr. |
|---|---|---|---|
| *1923* | | | |
| Sept. 1 | Balance | | $103, 671. 76 |
| Dec. 23 | Proportion of Amfranco capital stock | $31, 438. 22 | |
| *1924* | | | |
| Feb. 4 | Proportion of Haiti-Providence J/A | | 751. 48 |
| " 28 | " " McFadden-Bigio J/A | | 571. 33 |
| July 31 | Transfer of Personal a/c from New York | 59, 856. 78 | |
| Aug. 31 | Interest to August 31st, 1924 | | 4, 587. 50 |
| " " | Proportion of N. Y. P. & L. 1920/21 | | 1, 121. 62 |
| " " | " " " " 1923/24 | | 164, 199. 22 |
| Oct. 28 | Transfer of Personal a/c from N. Y. C/D 8/31/24 | 1, 042. 50 | |
| Nov. 21 | Additional compensation to N. Y. employees for season 1923/24—C/D 11/21/24 | 8, 948. 75 | |
| Dec. 12 | Adjustment with W. D. Stuart of payment made by W. A. Mayer—C/D 5/16/23 | 489. 74 | |
| " " | Proportion of additional coffee dept. profits for season 1923/24—C/D 12/12/24 | | 680. 33 |
| " " | Proportion of adjustment with W. D. Stuart and C. Arndt, Jr., account of Haitian Merc. Co. overhead expenses season 1923/24—C/D 7/31/24 | 370. 97 | |
| *1925* | | | |
| Jan. 7 | Proportion of H. T. Dumbell a/c charged off account of settlement of all claims of Mr. Dumbell C/D 8/31/21 | 2, 075. 21 | |
| " 30 | Proportion of additional compensation to N. Y. employees, season 1923/24—C/D 11/26/24 | 25. 00 | |
| Feb. 16 | Proportion of payment made by C. D. Freeman C/D 1/2/25 | | 5, 399. 30 |
| " 27 | Proportion of W. D. Stuart balance | 1, 935. 35 | |
| " " | Difference between 8% allowed Estate and 6% charged W. D. Stuart from 8/31/24 to 3/9/25 | 20. 19 | |
| " | Interest to March 9, 1925—8%—since 8/31/24 | | 6, 995. 45 |
| | | 106, 202. 71 | 287, 977. 99 |
| | | | 106, 202. 71 |
| | Balance due Estate March 9, 1925 | | 181, 775. 28 |

**3.** The decedent's share of the profits of the partnership for the fiscal year ending August 31, 1924, was $157,694.90, of which amount $32,174.53 accrued from the date of decedent's death (June 11, 1924) to August 31, 1924. The amount of $157,694.90 was included in the amount of $181,-775.28, which was determined on March 9, 1925, as due to the decedent's estate from the partnership, and no part of such amount was paid to the decedent's estate prior to March 9, 1925.

**4.** After the death of the decedent plaintiffs duly filed an estate tax return and on August 10, 1925, paid the tax

shown to be due thereon of $2,303.46. Plaintiffs included in the gross estate decedent's share of the earnings of the partnership for the fiscal year ended August 31, 1924 ($157,-694.90), without making any deduction for the part of such earnings ($32,174.53) which accrued from June 11, 1924, to August 31, 1924. After an audit of that return in which certain adjustments were made, which are not material to the issues in this case, the Commissioner determined a deficiency of $862.73, which was paid April 23, 1928, with interest of $143.52. In the aforementioned audit the Commissioner included decedent's share of the partnership profits for the fiscal year ended August 31, 1924, as a part of the decedent's gross estate without any reduction of such earnings on account of the part thereof which accrued from June 11, 1924, to August 31, 1924.

**5.** The decedent kept his books and rendered his returns on the receipts and disbursement basis. He filed his income tax returns on the basis of a calendar year. Subsequent to the death of the decedent his executors used the same basis and method of reporting both the income of the decedent and the income of his estate.

**6.** Plaintiffs, as executors of the estate of the decedent, filed an income tax return for the period from June 12, 1924, to December 31, 1924, but that return included no part of decedent's share of his interest in the earnings of the partnership for the fiscal year ending August 31, 1924.

**7.** Upon an audit of the return referred to in Finding 6 for the period June 12, 1924, to December 31, 1924, the Commissioner added to the net income shown on such return $32,174.53, which represented decedent's share of the partnership profits which accrued from June 11, 1924, to August 31, 1924.

**8.** As a result of the foregoing action by the Commissioner, a deficiency of $4,848.16 was determined and plaintiffs were notified thereof by letter dated March 14, 1929. No proceedings were instituted by plaintiffs before the Board of Tax Appeals on account of such deficiency and after appropriate assessment the deficiency was paid June 14, 1929, together with interest thereon in the amount of $1,225.59.

**9.** September 9, 1929, plaintiffs filed a claim for refund of $4,848.16, income tax for the period June 12, 1924, to December 31, 1924, and assigned as a basis therefor that the decedent's share of the earnings of the partnership ($32,174.53) which accrued for the period from June 12, 1924, to August 31, 1924, had been erroneously included in the gross income of the estate of decedent for the period June 12, 1924, to December 31, 1924. The claim further alleged that the amount of $32,174.53 (decedent's share of the earnings of the partnership from June 12, 1924, to August 31, 1924) had been included as a part of the gross estate of the decedent for estate tax purposes and such action had been approved by the Commissioner, and it was therefore urged that what had previously been reported, and accepted as a part of the corpus of the estate, could not when received be considered as income to the estate. The Commissioner rejected the claim for refund March 14, 1930.

**10.** As a result of the action set out above, decedent's share of the partnership profits for the period June 11, 1924, to August 31, 1924 ($32,174.53), has been taxed twice, namely, first, as corpus of the estate on which the estate tax was paid, and second, as income of the estate on which an income tax was paid. The amount of the estate tax which was collected from the estate as the result of the inclusion therein of the foregoing item of $32,174.53 was $791.68.

The court decided that plaintiffs were entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

James Temple Gwathmey died June 11, 1924. He had been a member of a partnership engaged in the business of cotton and merchandise brokers. The partnership agreement provided:

> In case of the death of one of the partners during the currency of any business year, his interest shall be continued until the expiration of said year, being credited with profits less withdrawals, or charged with losses plus withdrawals. At the expiration of said year the estate of said partner shall be credited with the amount which was to his credit at the last periodical ascertainment of values plus said profits less withdrawals, or minus said losses plus withdrawals.

Opinion of the Court

If the business of the partnership be continued by some or all of the remaining partners by a firm composed of some or all of the remaining partners, either alone or in connection with others, the new firm shall put to the credit of the estate of the dead partner the amount thus ascertained, together with any interest upon his capital accruing since the last ascertainment of his contribution. The estate shall be a creditor of the new partnership and shall be entitled to be paid one-fifth in cash at the end of the business year and the residue in four equal annual installments, with interest at the rate of eight per centum (8%) per annum, payable quarterly.

* * * * *

The fiscal year of the partnership ended on August 31. The decedent's share of the partnership profits for the fiscal year ended August 31, 1924, was $157,694.90. Of this amount $125,520.37 accrued to the date of his death and $32,174.53 accrued in the period from the date of his death to the end of the fiscal year of the partnership, June 11 to August 31, 1924.

The representatives of the decedent duly filed an estate tax return in which the total profits from the partnership were included as corpus of the estate and they paid the estate tax shown due thereon. Subsequently the estate tax return was audited by the Commissioner and certain changes were made, which are not material here, but the Commissioner did not allow a deduction from the gross estate of the decedent's share of the partnership profits from the date of the death of the decedent to the end of the partnership year. As a result of this audit the Commissioner determined a deficiency which was paid.

The decedent had kept his books and made his income tax returns on the calendar year basis and after his demise his representatives accordingly filed an income tax return for the period from the date of his death to the end of the calendar year. The profits of the partnership which had accrued for that period were not included. After the audit of the estate tax return, the Commissioner audited the income tax return and found a deficiency of $4,848.16. This deficiency was created because the Commissioner included in the decedent's gross income the item of $32,174.53

which was decedent's share of the partnership profits for the interim between his death and the end of the partnership year and which had heretofore been included and taxed by the Commissioner for estate tax purposes. This deficiency was paid and a refund claim was duly filed and rejected.

The plaintiffs contend that it was error of law on the part of the Commissioner to include the decedent's share of the partnership profits from his death to the end of the partnership year (June 11 to August 31, 1924) in gross income of the estate for the period June 11 to December 31, 1924, for the reason "that the right of the estate to receive the decedent's distributive share of his interest in the partnership determined under the articles of partnership constituted an asset of the estate which passed to it upon decedent's death and therefore was not income to the estate", and recovery is sought for the amount of income tax paid thereon by the estate.

In *Bull* v. *United States*, 295 U. S. 247, a similar situation was presented and the court held that the amount paid to the estate after the death of decedent was income and not a part of the estate and that was true whether the executor was considered a member of the old firm for the remainder of the year or that the estate was a partner in a new association formed upon decedent's death. The Commissioner was correct in including the profits earned after decedent's death in gross income for income tax purposes; it was income to the estate and was only taxable as part of gross income of the decedent's estate.

It is further contended, however, that even if this sum is income to the estate it was not taxable in the year 1924 because the estate was on the receipt and disbursement basis and this amount not actually paid during that calendar year. Suffice it to say that partnership profits are taxable to the partner whether actually distributed or not (sec. 218 (a) Revenue Act, 1924). In this case the partnership agreement, in definite terms, provides that, at the end of the year in which a partner dies and in the event the surviving partners desire to continue the business, the share of the deceased partner, including his proportion of the profits, shall be

Syllabus

placed to the credit of his estate and the estate shall become a creditor of the new firm and that interest be paid on the credit amounts. The final settlement shows interest was computed and paid from the end of the partnership year in 1924.

The further situation was presented in the *Bull case*, *supra*, which exists in this case, namely, the inclusion, under similar conditions, of income for income tax purposes which had previously been considered corpus and taxed for estate tax purpose, and the Court held that the Bull estate was entitled to recoupment of the amount erroneously collected as estate tax. As in that case, the claim for refund and pleadings of plaintiffs in the case at bar fairly place in issue a similar right of recovery, and a like decision must be reached. We do not understand that the estate tax was used as a deduction in determining the amount of income tax due and accordingly no adjustment is required on that account. The amount of estate tax which resulted from the inclusion in the gross estate of the item on which an income tax was likewise collected was $791.68.

Judgment will accordingly be entered in favor of plaintiffs for $791.68 with interest as provided by law from April 23, 1928. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## JEFFERSON AND CLEARFIELD COAL AND IRON COMPANY v. THE UNITED STATES

[No. 41844. Decided June 1, 1936]

*On the Proofs*

*Income and profits tax; character and basis of deductions from gross income; validity of statutes.*—Deductions from gross income allowable in determining net taxable income are statutory creatures of legislative grace, wholly within the discretion of Congress, and are to be computed upon the basis prescribed by the statutes; and it is immaterial to the validity of the statutes that a deduction for exhaustion, depletion, or depreciation may not be sufficient to return the taxpayer's capital tax free.

*Basis of deduction for depletion; basis of cost or of March 1, 1913, value.*—In the determination of the plaintiff's net taxable income for 1920, the deduction from gross income allowable for depletion of coal properties acquired prior to March 1, 1913, is to be computed upon the statutory basis of the value of the properties as of that date, regardless of the fact that such value was less than the cost of the properties to plaintiff.

*The Reporter's* statement of the case:

*Mr. Howe P. Cochran* for the plaintiff. *Mr. C. Leo De-Orsey* was on the briefs.

*Mr. George W. Billings*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

**1.** Plaintiff is, and at all times hereinafter mentioned was, a Pennsylvania corporation with its principal office and place of business at Indiana, Pennsylvania.

**2.** March 15, 1921, plaintiff filed its income and profits tax return for the calendar year 1920 showing a taxable net income of $1,589,051.81 and a total tax liability of $307,170.10. The tax thus shown was duly assessed and thereafter paid in installments during the year 1921.

**3.** Thereafter the Commissioner of Internal Revenue advised plaintiff of the determination of a deficiency for 1920 of $171,926.57, which was duly assessed by the Commissioner. The deficiency was paid January 26, 1927, with interest in the amount of $8,737.64.

**4.** June 19, 1930, plaintiff filed a claim for refund for 1920 and assigned the following basis therefor:

> Depletion was figured incorrectly, inasmuch as it was figured on the 1913 value instead of cost. It happens in this case that cost was greater than value at March 1, 1913. Depletion should have been figured the same as it was figured for the years 1924 to 1926, inclusive. See *Goodrich* vs. *Edwards* and other authorities. Taxpayer reserves the right to amend and/or add to this claim. Oral hearing is requested.

The claim was formally disallowed by the Commissioner on a schedule dated March 11, 1932.

**5.** In the determination of the deficiency referred to in finding 3 the Commissioner allowed a deduction for de-

pletion on coal properties owned by plaintiff on the basis of their value on March 1, 1913, which gave a depletion allowance of six cents per ton. The coal properties had been acquired by plaintiff prior to March 1, 1913, at a cost in excess of their value on March 1, 1913, and if the depletion allowance is to be computed on the basis of cost in lieu of March 1, 1913, value the depletion should be computed at 14.66 cents per ton instead of six cents per ton as computed by the Commissioner. In the determination as made by the Commissioner the depletion allowed was $30,994.62 for 1920, whereas if computed on the basis contended for by plaintiff, that is, cost, the amount allowable would be $75,730.19.

The court decided that plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

Upon facts which are not in dispute the question presented in this case is whether, in determining plaintiff's income and profits tax liability for 1920, the deduction allowable for depletion of its mining properties is to be computed on the cost of such property or on their March 1, 1913, value, where the former exceeds the latter. Plaintiff acquired certain coal properties at a cost which was in excess of their value on March 1, 1913. In accordance with the statute and regulations (Section 234 (a) (9) of the Revenue Acts of 1918 and 1921 and Articles 201 and 202 of Regulations 45 and 62) the Commissioner computed a depletion allowance of $30,994.62, based upon the March 1, 1913, value, whereas if he had used cost, as contended for by plaintiff, the allowance would have been $75,730.19. The governing statute referred to provides, in as far as here material

> (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (9) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based

upon cost including cost of development not otherwise deducted: *Provided*, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date:

The regulations are in conformity with the statute and plaintiff agrees that the allowance was made by the Commissioner in accordance therewith. What the plaintiff urges is that Congress is without power to base a deduction for depletion on the March 1, 1913, value of mining properties when such value is less than cost for the reason that such action would result in a tax on capital, that is, would not permit deductions sufficient in amount to return its capital to it tax free. That proposition is fully answered by the principle, now well established, that deductions from gross income are creatures of the statute which may not be taken as a matter of right but wholly because all deductions are matters of legislative grace and that this rule applies to a deduction for exhaustion of wasting assets, depletion or depreciation, even though the amount as allowed may not be sufficient to return to the taxpayer its capital tax free. *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103; *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *United States* v. *Biwabik Mining Co.*, 247 U. S. 116 and *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301. These decisions definitely establish that, when deductions are allowed, capital need not be preserved intact or need there be any segregation into capital and income of what comes to a taxpayer in the form of gross income.

As shown in the *Thompson case*, *supra*, Congress may allow a deduction for depletion which differs widely—whether more or less—from the depletion sustained as illustrated by the deduction for depreciation provided by the Revenue Act of 1913, Section G (b), where the allowance was "5 per centum of the gross value at the mine of the output for the year, for which the computation is made" and that without regard to the fact that it often did not "allow enough to return the capital on exhaustion of the reserve."

Plaintiff relies on certain decisions (*Goodrich* v. *Edwards*, 255 U. S. 527, *Walsh* v. *Brewster*, 255 U. S. 536;

*United States* v. *Flannery*, 268 U. S. 98, and *Ludey* v. *United States*, 274 U. S. 295) wherein the Court had for consideration gain or loss on a sale, a totally different question, and applied the principle that under such circumstances cost as well as the March 1, 1913, value must be considered. The Court, however, stated specifically in *Thompson Oil & Gas Co., supra*, that a different rule applied where we are concerned with a deduction for depletion, the question there being "what allowance Congress intended should be made from the gross annual income" whereas in cases of the character referred to by plaintiff the question is "how much of the capital has already been returned tax-free."

There can be no question of the intent of Congress to allow the depletion allowed by the Commissioner, and no more, and the validity of the acts authorizing such allowance is fully sustained by the authorities heretofore cited.

It follows that the petition must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## T. W. WARNER COMPANY, A DELAWARE CORPORATION, v. THE UNITED STATES

[No. 41902. Decided June 1, 1936]

*On the Proofs*

*Income and profits tax; decision of Board of Tax Appeals; res adjudicata.*—Under the enlarged jurisdiction of the United States Board of Tax Appeals a decision of the Board, unappealed from, is final and conclusive on the parties to the controversy and renders the issues involved in the decision *res adjudicata.*

*Same; validity of waiver and assessment thereunder.*—A decision of the United States Board of Tax Appeals holding a waiver extending the statutory period for assessment of plaintiff's income and profits tax, and a deficiency assessment by the Commissioner of Internal Revenue thereunder, to be invalid, renders such questions *res adjudicata.*

*Commissioner's refusal to pay allowed refund claim; validity of allowance of claim.*—Where a claim was filed by the plaintiff March 15, 1926, for refund of an admitted overpayment of its income and profits tax for the fiscal year 1920, on its tax return filed March 15, 1921, and the Commissioner of Internal Revenue, after allowance of the refund by certificate of overassessment signed April 27, 1926, and the issuance of a check therefor, recalled and canceled the check and credited the overpayment on a barred deficiency assessment for the year 1917, and then later, conceding the deficiency assessment invalid, finally, on February 9, 1931, and later, refused to refund the overpayment on the ground that its allowance by him was barred at the time because his certificate of overassessment was not within 5 years from the date of the plaintiff's tax return; the plaintiff is entitled to recover for such overpayment in its suit therefor instituted March 14, 1932.

*The Reporter's* statement of the case:

*Mr. Fred E. Fuller* for the plaintiff. *Messrs. Richard S. Doyle, George D. Welles* and *Harley A. Watkins* were on the brief.

*Mr. John W. Hussey*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

The court made special findings of fact as follows:

**1.** T. W. Warner Company (not the plaintiff) was incorporated on April 15, 1911, under the laws of the State of Indiana. Its place of business was at Muncie, Indiana. It manufactured automobile transmissions and steering gears until November 17, 1919, at which time it leased all its physical property to the General Motors Corporation. This company will hereafter be referred to as the "Indiana corporation."

**2.** T. W. Warner Company, plantiff, was incorporated on November 16, 1920, under the laws of the State of Delaware. Its place of business was at Toledo, Ohio. This company will be hereafter referred to as the "Delaware corporation."

**3.** On December 9, 1920, plaintiff, the Delaware corporation, purchased all of the assets and assumed all of the liabilities of the Indiana corporation, and on that date the title of all such property was transferred to plaintiff by a bill of sale. The Indiana corporation then became inactive.

Payment for these assets was made by plaintiff issuing to the stockholders of record of the Indiana corporation one share of the stock of the Delaware corporation (plaintiff) in exchange for each share of stock of the Indiana corporation.

On January 22, 1921, plaintiff, T. W. Warner Company, by bill of sale transferred all the physical properties of said company to General Motors Corporation.

**4.** Subsequent to the sale of December 9, 1920, the Indiana corporation began proceedings looking to its voluntary dissolution. On January 16, 1921, the Secretary of State of Indiana certified that the necessary steps to dissolution had been taken, and on September 10, 1921, the Indiana corporation was finally dissolved pursuant to the laws of the State of Indiana.

**5.** The name T. W. Warner Company was used occasionally by both the Indiana corporation and the Delaware corporation without clearly distinguishing identifications. T. W. Warner was the major stockholder, as well as president, of each of the corporations.

On December 9, 1920, the officers of the Delaware corporation were: T. W. Warner, president; Nettie M. Warner, vice president; and E. H. Witker, secretary and treasurer.

Prior to December 9, 1920, E. H. Witker was not a stockholder, officer, or director of the Indiana corporation, although he had been associated with that company for several years. On December 9, 1920, Witker became secretary of the Indiana corporation, and continued as such secretary until the company was dissolved. On December 9, 1920, the books and records of the Indiana corporation were transferred to the Toledo office of the Delaware corporation, and on December 10, 1920, the Delaware corporation opened an account in its name with the First National Bank of Toledo, Ohio.

**6.** On March 15, 1921, T. W. Warner Company filed on behalf of itself and its predecessor corporation an income and excess profits tax return for the year 1920 with the collector of Internal Revenue at Indianapolis, Indiana, in which district the Indiana corporation had previously filed its return. The return covered the transactions of the Indiana corporation from January 1, 1920, to December 9, 1920, and

the transactions of the Delaware corporation from December 9, 1920, to December 31, 1920, both inclusive. The return made no segregation of income of the two corporations. The return was executed under date of March 5, 1921, by "T. W. Warner, president", and "Edward H. Witker, treasurer." On March 5, 1921, T. W. Warner was president of both corporations, and on that day Edward H. Witker was treasurer of the Delaware corporation only. On March 5, 1921, Edward H. Witker was in Ohio, and T. W. Warner was in California. The return bore no corporate seal and was notarized in California. The heading on the return was as follows: "T. W. Warner Co., Toledo, Ohio, formerly Muncie, Indiana." On page 3 of the return, under the title "Predecessor business", appear the following unanswered questions:

> 16. Did the corporation file a return under the same name for the preceding taxable period? Answer "Yes" or "No" ______. If not, was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or the preceding taxable period? Answer "Yes" or "No" ______. If answer is "Yes", give name and address of each predecessor business.

The return is of record as plaintiff's exhibit 9 and is by reference hereby made a part of this finding.

**7.** The tax return so filed on March 15, 1921, disclosed a total net income tax for the calendar year 1920 of $14,787.05, which amount was assessed and paid by the Delaware corporation to the collector of Internal Revenue at Indianapolis, Indiana. It was paid in quarterly payments, the last payment, in the sum of $3,696.77, being made on December 15, 1921.

The payments were made by checks drawn on the First National Bank of Toledo, Ohio, and signed "T. W. Warner Company, E. H. Witker, secy. and treas." When these four checks were issued, E. H. Witker was secretary and treasurer of the Delaware corporation but was not such officer of the Indiana corporation. Entries reflecting the four payments were spread on the books of the Delaware corporation. The account on which the checks were drawn consisted of deposits of moneys payable to the Delaware corporation.

8. In August 1923 a revenue agent examined the books and records of the T. W. Warner Company for the years 1917 to 1920, both inclusive. He recommended that deficiencies be assessed for the years 1917, 1918, and 1919, and further that an overassessment in the amount of $14,787.05 be allowed for the year 1920. A copy of the report was furnished attorneys for plaintiff. This report dated August 22, 1923, contained a statement that the assets and liabilities of the Indiana corporation were taken over by the Delaware corporation, and that the Indiana corporation was dissolved on September 10, 1921.

On August 1, 1924, the revenue agent again examined the books and records for the same years and recommended revised deficiencies for the years 1917, 1918, and 1919. His report again recommended the allowance of $14,787.05 as an overassessment for the year 1920. A copy of this report was furnished attorneys for plaintiff.

9. The Delaware corporation filed its income and excess profits tax returns for the calendar years 1920, 1921, 1922, 1923, and 1924, and paid its taxes to the collector of Internal Revenue at Indianapolis, Indiana—the same collector to whom the Indiana corporation had prior thereto made its returns and paid its taxes.

The Delaware corporation filed its income and excess profit tax returns for the calendar years 1925, 1926, 1927, and 1928, and paid its taxes to the collector of Internal Revenue at Toledo, Ohio.

The Delaware corporation filed its income and excess profits tax returns for the calendar year 1929 and each succeeding year thereafter and paid its taxes to the collector of Internal Revenue at Los Angeles, California.

On March 3, 1925, the unpaid tax accounts of T. W. Warner Company for the years 1917 to 1920 were transferred by the collector of Internal Revenue at Indianapolis, Indiana, to the collector of Internal Revenue at Toledo, Ohio. On April 19, 1926, the unpaid accounts were re-transferred to the collector of Internal Revenue at Indianapolis, Indiana. On July 19, 1926, these unpaid accounts were again transferred to the collector of Internal Revenue at Toledo, Ohio.

Reporter's Statement of the Case

**10.** There was originally assessed against the Indiana corporation on its return for 1917 the sum of $50,336.20. The Indiana corporation paid that amount on June 19, 1918. In 1919 an additional assessment of $10,629.65 was made for the year 1917, which sum the Indiana corporation paid soon thereafter. In March 1924, an additional assessment of $166,810.50 was made for the year 1917. On April 8, 1926, of this latter amount the sum of $82,997.65 was abated. The Indiana corporation did not pay the balance, contending that it was barred by the statute of limitations. The assessment list opposite the sum of $166,810.50 and in the column headed "Remarks" indicates that "waiver" had been filed.

**11.** On February 7, 1923, T. W. Warner Company filed a waiver "irrespective of any period of limitations." It was signed "T. W. Warner Co.", and covered the year 1917. On January 18, 1924, T. W. Warner Company filed a waiver purporting to extend the statutory period applicable to 1917, in which appears the following language:

> This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

The last mentioned waiver was signed "T. W. Warner Company, Ind., by E. H. Witker, Secretary", and to it was affixed the seal of the Indiana corporation.

**12.** On April 5, 1924, the Indiana corporation, by letter, advised the collector at Indianapolis that it had been "dissolved some years ago." On April 9, 1924, the collector at Indianapolis in a letter to the attorneys for T. W. Warner Company stated that he had apprised the Department of the dissolution of the Indiana corporation. On September 17, 1924, the Indiana corporation executed its power of attorney over its seal to the law firm of Tracy, Chapman and Welles, of Toledo, Ohio.

The law firm of Tracy, Chapman and Welles, of Toledo, Ohio, or some one or more of its individual members, represented the Indiana corporation from some time in the

year 1919 up to time of its dissolution, and has represented the Delaware corporation since its incorporation, November 16, 1920.

**13.** On March 3, 1926, the Commissioner of Internal Revenue approved the findings of the revenue agent for the year 1920, and executed Schedule of Overassessments No. I. T. A.–19451, which disclosed an overassessment in favor of T. W. Warner Company for the full tax assessment against it for the year 1920, to wit, $14,787.05. The Commissioner forwarded same to the Indianapolis collector, with instructions to determine whether that amount should be refunded or applied as a credit against any taxes due and unpaid.

On March 17, 1926, the collector at Indianapolis noted on Certificate of Overassessment No. 881112, which accompanied Schedule of Overassessment No. I. T. A.–19451 that the full amount of the overassessment was refundable. The collector on March 26, 1926, returned the schedule of overassessments to the Commissioner, in which the collector certified that the net amount of $14,787.05 should be refunded. On March 30, 1926, the collector transmitted to the Commissioner Schedule of Refunds and Credits No. I. T. R.–19451, which certified that the net amount of $14,787.05 was refundable to T. W. Warner Company for the taxable year 1920.

**14.** On March 15, 1926, T. W. Warner Company, the Delaware corporation, filed with the collector at Toledo, Ohio, a claim for the refund of $14,787.05 income and excess profits taxes. This claim bore no corporate seal; carried at its top "State of Ohio, County of Lucas, S. S."; was executed on March 12, 1926, in California; and was signed "T. W. Warner Co. T. W. Warner, prest."

On April 27, 1926, the Commissioner of Internal Revenue approved Schedule of Refunds and Credits No. I. T. R.–19451, which showed the refund for the year 1920 as $14,-787.05, plus interest in the sum of $4,068.37, being a total of $18,855.42.

Under date of March 12, 1926, there appeared the following endorsement on the claim of T. W. Warner Company: "Refund allowed on I. T. A.–19451." It was the general practice in the Bureau of Internal Revenue to stamp on the

face of claims for refund the schedule on which it was allowed.

On April 27, 1926, the Commissioner directed the disbursing clerk, Treasury Department, on Schedule of Refunds and Credits No. I. T. R.–19451, to make payment to T. W. Warner Company in the sum of $18,855.42, as shown thereon. On May 15, 1926, the disbursing clerk prepared and transmitted a check in that amount to the collector at Indianapolis, with instructions to deliver same to the taxpayer.

**15.** On May 20, 1926, T. W. Warner Company received at its office in Toledo, Ohio, a letter from the Indianapolis collector which was mailed pursuant to the direction of the Commissioner of Internal Revenue. This letter advised the T. W. Warner Company that the collector was holding a check drawn in favor of the T. W. Warner Company on account of an overpayment on tax per schedule I. T. A.–19451, in the amount of $18,855.42, and requested the company to state that there were no outstanding Internal Revenue taxes against it due and payable at his office or the office of any other collector of Internal Revenue, and to state whether it had taken credit in its income tax return filed during the current year for any amount representing an overpayment of tax on account of a prior year's account.

On June 12, 1926, after advising with its attorneys, T. W. Warner Company, the Delaware corporation, wrote the Indianapolis collector, in the name of the dissolved Indiana corporation but on behalf of itself, the Delaware corporation, advising him that there were no outstanding taxes against the Indiana corporation which were not barred by the statute of limitations. The letter was signed as follows: "T. W. Warner Company (Indiana corporation) By E. H. Witker (last secretary)."

**16.** Inasmuch as the transcript of accounts forwarded by the Toledo collector to the Indianapolis collector reflected an outstanding deficiency of $94,846.29 for the year 1917, the Indianapolis collector refused to deliver Treasury check No. 891565 in the amount of $18,855.42 to T. W. Warner Company, but returned same under date of June 16, 1926, to the Accounts and Collection Unit of the Treasury Department.

Reporter's Statement of the Case

**17.** On June 25, 1926, the Commissioner of Internal Revenue acknowledged receipt of the check, stating that the amount of the check would be deposited as a repayment to the appropriation on which it was drawn, and directed the Indianapolis collector to apply the principal amount ($14,787.05) of the tax overpayment, without interest, as a credit to the outstanding 1917 taxes of the Indiana corporation.

On June 28, 1926, the Indianapolis collector entered the sum of $14,787.05 on his books as a credit upon the deficiency assessed on March 10, 1924, for the year 1917. The Indianapolis collector physically changed Certificate of Overassessment No. 881112 from showing a refund of taxes in the amount of $14,787.05, and interest in the amount of $4,068.37, to show a credit of $14,787.05 against a tax liability for the year 1917. On July 28, 1926, the physically changed certificate was for the first time delivered to T. W. Warner Company. The total assessment was $166,810.50. Of this sum $82,997.65 had previously been abated. The application of the credit left an unpaid balance of $69,025.80.

On July 22, 1926, the Toledo collector forwarded to T. W. Warner Company, care of Tracy, Chapman and Welles, a statement of taxes assessed against the Indiana corporation for 1917, showing the credit of $14,787.05. On July 26, 1926, Tracy, Chapman and Welles protested to the Toledo collector against the right of defendant to so apply the $14,787.05. On November 3, 1926, Tracy, Chapman and Welles again protested to the Toledo collector against the right of defendant to so apply the $14,787.05, asserting that the collection of the alleged additional tax was barred by the statute of limitations.

**18.** On November 4, 1926, the Commissioner of Internal Revenue issued a sixty-day deficiency letter to the Delaware corporation, as transferee of the assets of the Indiana corporation, proposing to assess against the Delaware corporation as such transferee a deficiency of $69,025.80, the unpaid balance of the deficiency assessment of $166,810.50 made in March 1924 against the Indiana corporation.

No suit or other proceeding for the collection of the additional 1917 taxes was ever instituted against the Indiana

corporation, and no claim or demand was asserted and no assessment made against the Indiana corporation for the additional 1917 taxes prior to December 9, 1924.

On December 24, 1926, the Delaware corporation appealed to the United States Board of Tax Appeals from the proposed transferee deficiency assessment. On May 8, 1930, the Board of Tax Appeals held that the Delaware corporation as transferee was not liable for the proposed transferee deficiency assessment, for the reason that the alleged waivers were a nullity, and the assessment and collection of the alleged tax were barred by the expiration of the statute of limitations both as to the transferor, Indiana corporation, and the transferee, Delaware corporation. The United States formally acquiesced in the decision of the United States Board of Tax Appeals, and the proposed deficiency was abated on Schedule IT 40280, dated November 17, 1930.

**19.** On June 4, 1930, the attorneys for T. W. Warner Company requested the Indianapolis collector to return the amount of the overpayment, with interest, covering the calendar year 1920.

On June 12, 1930, the Indianapolis collector advised the attorneys that he had returned the check to Washington on June 16, 1926, and suggested they write the General Accounting Office at Washington, D. C.

On June 13, 1930, the attorneys wrote the General Accounting Office at Washington, D. C., requesting the remittance of the amount of the overpayment with interest.

On September 5, 1930, the General Accounting Office advised the attorneys that the check had been canceled and the proceeds thereof had been placed to the credit of an appropriation entitled "Refunding taxes illegally collected 1927 and prior years", that being the appropriation from which it had been drawn.

**20.** On November 10, 1930, the attorneys for T. W. Warner Company wrote the Indianapolis collector, requesting refund of the $14,787.05, plus interest. The letter contained the following sentence:

> We also enclose herewith powers of attorney showing our authority to act for both T. W. Warner Company

of Indiana, which was in business in 1917, and its successor and assignee, T. W. Warner Company of Delaware.

On January 23, 1931, these attorneys by telegram requested the Commissioner of Internal Revenue to reply to their letter of November 10, 1930.

On January 26, 1931, the Commissioner wrote the attorneys, advising them that the return for 1920 was under review and upon conclusion of same they would be advised.

On February 9, 1931, the Commissioner of Internal Revenue wrote the attorneys a letter reading in part as follows:

> An examination discloses that the 1917 tax liability to which the overassessment for the year 1920 was credited was held to be barred from collection on March 30, 1923. A further examination discloses, however, that your income tax return for 1920 was filed March 15, 1921. The schedule of overassessment allowing $14,787.05 was signed by the Commissioner of Internal Revenue April 27, 1926. This allowance was, therefore, barred by the provisions of section 284 of the Revenue Act of 1926 and could not, therefore, be legally made. In this connection your attention is called to the recent decision by the United States Supreme Court in the case of *Boston Buick Company*. Since your return for 1920 was due and, as a matter of fact, was filed on March 15, 1921, the certificate of overassessment approved by the Commissioner April 27, 1926, was not within five years from the due date of the return as required by section 284 of the Revenue Act of 1926.
>
> Your attention is, therefore, called to the fact that while the outstanding tax liability for the year 1917 against which the overassessment for the year 1920 was applied was barred from collection; the overassessment for the year 1920 was likewise barred from allowance. No portion of the above overassessment for the year 1920 is, therefore, allowable.

**21.** Pursuant to a request of the attorneys, conferences were held in the Audit Review Division of the Bureau of Internal Revenue on July 10, 1931, and August 13, 1931.

At the conference of July 10, 1931, they discussed the rights of the T. W. Warner Company, the Delaware corporation, to the refund of the overpayment for 1920, based on an account stated and upon the claim for refund.

On July 10, 1931, the Audit Review Division prepared a conference report on the conference, which was signed by the conferee, auditor, and chief conferee.

On July 29, 1931, the attorneys for the Delaware corporation sent a letter to the Commissioner of Internal Revenue, setting forth their views with respect to the claim for refund and payment of the 1920 overpayment, and on August 3, 1931, the Commissioner acknowledged the letter and advised the attorneys that careful consideration would be given to the same, and that they would be further advised relative thereto at the earliest practicable date.

On August 13, 1931, after considering the letter of July 29, 1931, from the attorneys for the Delaware corporation, the Audit Review Division of the Office of the Commissioner of Internal Revenue prepared a supplemental conference report in which there is discussed the timeliness of the allowance of the overassessment and overpayment for 1920, the claim for refund, and the account stated theory, and it was therein recommended that a further conference be granted with a representative of the General Counsel's Office present.

**22.** Shortly after August 13, 1931, the case was referred to the General Counsel's Office for review, and from August 22, 1931, to May 26, 1932, the General Counsel's office reviewed the case and all papers in the case, including the claim for refund, and gave consideration to the contentions of the attorneys for the Delaware corporation that there should be refunded to the taxpayer the overpayment of income and excess profit taxes for the calendar year 1920, on the basis of an account stated, the implied promise to pay, and upon the merits of the claim for refund, and numerous and frequent conferences were had between the representatives of the General Counsel's Office and the attorneys for the Delaware corporation with respect thereto. The computation of the overassessment was not considered, but the fact that there was an overpayment for the year 1920 was conceded by the representatives of the General Counsel's Office, the only issue being whether the plaintiff was entitled to have it refunded.

**23.** On March 14, 1932, T. W. Warner Company, the Delaware corporation, filed its petition in the Court of Claims.

On May 26, 1932, general counsel for the Bureau of Internal Revenue advised attorneys for plaintiff that "After due consideration of the case it is deemed advisable for the Government to defend the action in the Court of Claims."

**24.** From May 26, 1932, to April 1, 1933, numerous conferences were held between attorneys for the Delaware corporation and the representatives of the General Counsel's Office. On July 7, 1932, a conference was held with representatives of the General Counsel's Office. At these conferences consideration was given to refund of overpayment of 1920 taxes on an account stated, on an implied promise to pay, and on the claim for refund theories.

On September 19, 1932, counsel for plaintiff filed a memorandum brief in re "Claim for payment of Certificate of Overassessment No. 881112, T. W. Warner Co., Toledo, Ohio, taxable year 1920, Schedule No. I. T. A.-19451." The brief contained the following language:

> The capital structure of the Delaware Company was identical with the Indiana Company, as was its assets and liabilities, so, that under the rulings of the Income Tax unit, what in fact occurred, in so far as income tax purposes are concerned, was a transfer of domicile of the corporation from the State of Indiana to the State of Delaware and a transfer of the main place of business of the corporation from Muncie, Indiana, to Toledo, Ohio.
>
> The books of the Indiana corporation and of the newly organized Delaware corporation are in possession of counsel for the plaintiff and disclose no interruption at the time of sale, each account being kept continuously in the same ledger following the transfer as before, the successor corporation utilizing the books of account and the records of the original corporation.

On April 1, 1933, the attorneys for plaintiff were advised that the Interpretative Division had finally prepared an adverse recommendation, addressed to the Civil Division, and transmitted the case back to the Civil Division for defense in the Court of Claims.

25. The Commissioner of Internal Revenue, by letter dated November 24, 1933, wrote one of the attorneys for plaintiff as follows:

> Without admitting or conceding that the questions set forth in your letter were in any manner considered or agreed to be considered by any officer or representative of the government, you are informed that this office is advised that the General Counsel's office, after considering the case, deemed it unnecessary to refer the alleged claim for refund for the year 1920 to this office for consideration. This office sees no reason for considering the claim at this time.

On April 11, 1934, the Commissioner of Internal Revenue wrote one of the attorneys for plaintiff as follows:

> Please be advised that the alleged claim for refund improperly filed by T. W. Warner Company has never been officially rejected or allowed by this office.
>
> You are further advised that inasmuch as T. W. Warner Company has a suit pending in the United States Court of Claims seeking a recovery of the full amount claimed in the alleged claim for refund for the year 1920, it is deemed unnecessary and inadvisable for this office to take any action on the alleged claim, and accordingly this office respectfully declines to consider the alleged claim.

April 24, 1934, plaintiff filed herein its amended petition.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The findings in this tax case are many and in great detail. The court gives them because of the insistence of the parties that they are essential to the presentation of their respective contentions. The court is of the opinion that but one issue is involved, i. e., the validity or invalidity of the waivers filed extending the statute of limitations as to assessment and collection of the taxes hereafter set forth and discussed. This suit is for the recovery of an alleged overpayment of income and profits taxes for the calendar year 1920.

Two corporations must be referred to. The first one is the T. W. Warner Company, incorporated under the laws

of Indiana on April 15, 1911, and having its place of business at Muncie, Indiana, hereafter referred to as the Indiana corporation. The second one of precisely the same name, i. e., T. W. Warner Company, was incorporated under the laws of Delaware on November 16, 1920, and its place of business was Toledo, Ohio. T. W. Warner owned substantially all the stock in both companies, was the President of the Indiana corporation, and later President of the Delaware corporation.

On December 9, 1920, the Delaware corporation purchased all the assets of the Indiana corporation and assumed all its outstanding liabilities. The consideration for the sale was an even exchange of stock in the old company for stock in the new one. Subsequent to the sale, on September 10, 1921, the Indiana corporation was dissolved under the laws of Indiana.

March 15, 1921, the Delaware corporation filed its income and profits tax return with the Collector of Internal Revenue at Indianapolis, Indiana, for the calendar year 1920. This return disclosed the tax liability of the company by including the transactions of the Indiana corporation from January 1, 1920, to and including December 9, 1920, when it was acquired by the Delaware corporation, and the transactions of the Delaware corporation to the close of the year. The company stated its tax liability to be $14,787.05 and this sum was paid to the collector at Indianapolis.

In August 1923 a revenue agent examined the books and records of the company for the years 1917 to 1920, inclusive. The agent recommended the assessment of deficiencies against the Indiana corporation for the years 1917, 1918, and 1919, and an overassessment in favor of the Delaware corporation for the year 1920 of $14,787.05. The Indiana corporation paid the original deficiency assessments. However, in March 1924 an additional deficiency was assessed against the corporation for 1917 amounting to $166,810.50. Later the Commissioner abated $82,997.65 of this assessment, leaving an unpaid tax of $83,812.85.

Without going into additional detail, it is sufficient to state that the Commissioner, after executing his original

schedule of overassessment of the Delaware corporation for 1920 and directing in the established manner the refund of the overpayment for that year to the corporation, upon later information as to the unpaid additional deficiency of the Indiana corporation for 1917 recalled the issued refund check for the overpayment, changed his records, and on November 4, 1926, issued a sixty-day deficiency letter to the Delaware corporation, assessing against it as transferee a deficiency tax of $69,025.80, i. e., the balance unpaid of additional deficiency tax of the Indiana corporation.

The Commissioner determined the additional tax due from the Indiana corporation by applying as a credit the overpayment of the Delaware corporation for 1920. The computation of the tax submitted to the plaintiff was as follows: Additional deficiency assessment against the Indiana corporation for 1917 of $166,810.50, less $82,997.65 abated, leaving an unpaid balance of $83,812.85. By the application of the $14,787.05 overpayment of the Delaware corporation for 1920, plaintiff's tax liability as a transferee was determined in the sum of $69,025.80.

December 24, 1926, the Delaware corporation appealed to the Board of Tax Appeals, and on May 8, 1930, the Board decided that the waivers filed by the taxpayers were invalid, and hence the Delaware corporation was not liable as a transferee for the payment of the tax. 19 B. T. A. 872. The Commissioner acquiesced in this decision but refused to refund to the Delaware corporation the $14,787.05 overpayment previously allowed it for 1920 on the ground that under section 284 of the revenue act of 1926 such a refund could not be lawfully allowed. The Commissioner, at the time he refused to refund the overpayment for 1920, expressly stated and called the attention of the taxpayer to the fact that the outstanding tax liability for the additional taxes for the year 1917 was barred from collection by the statute of limitations (Finding 20).

It is conceded that the additional deficiency assessment against the Indiana corporation for 1917 was barred by the statute of limitations unless a waiver executed by the company on February 7, 1923, extended the time for assess-

ment beyond the period of March 1924. Another waiver executed by the company on January 18, 1924, appears of record and is set forth in Finding 11.

The plaintiff contends that, irrespective of other available legal rights to recover a judgment for the tax involved, the decision of the Board of Tax Appeals holding both of the above waivers invalid, a decision from which the Commissioner did not appeal, is *res adjudicata*, and that the defendant may not attack the correctness of that decision collaterally in this court. The defendant insists that the decision is not binding on this court and is not *res adjudicata*.

The case of the *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, determined the jurisdiction of the Board of Tax Appeals, and the conclusiveness of its decision unappealed from. One quotation from this exhaustive opinion expresses the established rule of law. "The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest and demonstrates the unsoundness of the objection" (p. 727). Since the decision in the *Old Colony case* was announced, a long line of cases has arisen and we find no one case which seeks to apply a different rule.

In the case of *Tait* v. *Western Maryland Railroad Co.*, 289 U. S. 620, the Supreme Court held, quoting from the syllabus—

> It will not be inferred that Congress, merely by adopting the scheme of annual tax periods, and without express declaration of purpose, intended to abolish the doctrine of *res judicata* in tax cases and thus to deprive Government and taxpayer of relief from redundant litigation of identical questions as to the liability of the same taxpayer under the same taxing provisions. *United States* v. *Stone & Downer*, 274 U. S. 225, respecting *res judicata* in tariff cases, distinguished.

It is not essential to review the numerous cases cited in the brief. The Revenue Act of 1926 enlarged the jurisdiction of the Board, and it has been repeatedly held that where a taxpayer resorts to the Board, the remedy available to both the taxpayer and the Commissioner in the event of an adverse holding is by way of appeal to the Federal

Opinion of the Court

courts mentioned. *Bankers Reserve Life Co.* v. *United States*, 71 C. Cls. 279, certiorari denied, 283 U. S. 836. It may be that if the Board of Tax Appeals had had the decision of the Supreme Court in *Helvering* v. *Newport Co.*, 291 U. S. 485, before it an entirely different judgment would have been reached, but there is nothing said in the case which warrants the existence of a collateral attack upon the Board's judgment, which became final when not appealed from. *Art Metal Construction Co.* v. *United States*, decided by this court March 2, 1936 (82 C. Cls. 666).

In *Helvering* v. *Newport Co.*, *supra*, the parties pursued the statutory remedies, whereas in the Board of Tax Appeals case now challenged by the defendant the Commissioner acquiesced in the judgment and thereafter sought by his own interpretation of the statute of limitations, applicable to the allowance of an overpayment for a given year, to withhold from plaintiff the payment of the same. See Sec. 284 (d) of the Revenue Act of 1926. The case of *Kieckhefer* v. *United States*, 8 Fed. Supp. 734, is clearly distinguishable from this case upon the facts found, and in addition to this the suit in the Court of Claims related exclusively to the years 1918 and 1920 and the suit before the Board of Tax Appeals related to the year 1919, and the taxable periods were not the same. See Section 272 (g) of the Revenue Act of 1928.

The plaintiff's refund claim was timely filed, and we are of the opinion that the court has jurisdiction.

The Board of Tax Appeals had before it the precise issue involved in this case. The same facts and the same tax adjustments made by the Commissioner are determinative of the issue in both cases, and in our opinion the decision of the Board became final and not open to collateral attack in this case.

The plaintiff is entitled to a judgment for $14,787.05, with interest as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

Syllabus

# THE FOUNDATION COMPANY v. THE UNITED STATES

[Nos. 42394 and M-155. Decided June 1, 1936]

## *On the Proofs*

*Income and profits tax; jeopardy assessment; decision of Commissioner of Internal Revenue conclusive.*—The determination of whether a jeopardy assessment of income and profits tax under section 274 (d) of the Revenue Act of 1924 should be made, or whether an additional assessment should be made before a final decision was reached as to the correct tax liability, or which of certain alternative courses should be pursued in the premises, is left by the statutes wholly to the Commissioner of Internal Revenue, and his decision is not reviewable by the court.

*Validity of jeopardy assessment in absence of deficiency notice.*—Where the Commissioner of Internal Revenue was considering the plaintiff's tax liability for several different but related years, and not being able to finally determine the correct liability for one of the years within the time limitation for assessment, made an immediate jeopardy assessment for such year for the sole purpose of saving the right of assessment and collection, the assessment was valid and not subject to judicial review as arbitrary because of a 60-day deficiency notice not having been given.

*Same; validity of assessment not affected by requirement of appeal bond.*—The taxpayer was not deprived of any legal rights in respect of its taxes for the years involved by the jeopardy assessment under section 274 (d) of the Revenue Act of 1924 to avoid the bar of the time limitation on assessment; and the legality of the assessment was not affected by the fact that bond was necessary to obtain review by the Board of Tax Appeals.

*Same; discretion of Commissioner of Internal Revenue in giving jeopardy deficiency notice.*—While the Commissioner of Internal Revenue might give the taxpayer 60-day jeopardy deficiency notice of additional assessment under section 274 (d) of the Revenue Act of 1924, it was not contemplated by the statute that the Commissioner should give such notice in cases where he had not completed his audit and made a considered determination as to the tax liability for the year involved.

*Credit for taxes paid foreign country; when paid by domestic corporation, or by subsidiary of domestic corporation.*—In the provisions of section 238 (a) of the Revenue Act of 1918 for credit against income for taxes paid by a domestic corporation to a foreign country, the word "paid" means paid or accrued; but the act provided a different rule with respect to credit for taxes paid by a foreign subsidiary of a domestic corporation, taxes in such a case accrued but not paid being specifically excluded as a credit by the statute.

*Credit for tax paid foreign country; Revenue Act of 1921 not retroactive.*—The Revenue Act of 1921 provided a different rule with respect to credit of taxes paid a foreign country against income of a domestic taxpayer from the rule provided by the Revenue Act of 1918, but was not retroactive and therefore had no application to taxes for the year 1920.

*Interest on overpayments credited on taxes for prior years; erroneous entry by collector.*—Where the collector erroneously entered on the certificate of overassessment an allowance of interest on an overpayment of income and profits tax credited on unpaid taxes for prior years, there can be no recovery by the taxpayer for such interest.

*The Reporter's* statement of the case:

*Mr. I. Herman Sher* for the plaintiff. *Satterlee & Green* were on the brief.

*Mr. Guy Patten*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

In these two cases plaintiff seeks to recover a total of $400,532.17, income and profits tax of $362,909.43 and $35,692.91 alleged to have been erroneously and illegally collected for 1918 and 1920, respectively, with interest from certain dates on which various amounts making up the total claimed were paid or collected by credit, and $1,929.83 as interest alleged to have been allowed but not paid for 1924. Case No. 42394 relates to 1918 for which the Commissioner collected an additional tax of $362,909.43 which plaintiff claims was barred by the statute of limitation. The amount of $274,348.05 of this tax was collected by credit of overpayments totaling that sum for 1917, 1919, 1920, 1921, 1924, and 1926. The balance of $88,561.38 was paid in cash. In this case plaintiff sues also, in the alternative, for the overpayments for the years mentioned with interest.

Case M-155 relates to 1920 for which plaintiff claims an additional overpayment of $35,692.91 with interest, based upon certain questions relating to invested capital, additional credit for foreign taxes, and also the question of the statute of limitation involved in the 1918 case inasmuch as an overpayment for 1920 was credited to the additional tax for 1918.

In addition, the above-mentioned interest of $1,929.83 is sought to be recovered on the ground that it was shown on the certificate of overassessment for 1924 and not refunded or credited.

The defendant contends that the additional tax for 1918 was legally assessed and collected within the time allowed by law and that the tax for 1920 was correctly determined by the Commissioner, except that an adjustment should be made increasing invested capital on account of the deduction therefrom of taxes in excess of the amounts due for other years, and that by reason of this adjustment plaintiff is entitled to recover $4,356.76 for 1920 with interest.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a New York Corporation and its business has always been that of an engineering and contracting company specializing in foundations and construction work, including subaqueous work of all kinds, the building of industrial plants, power developments, railroads, bridges, and general building construction. It was organized with an authorized capital stock of $50,000, consisting of 500 shares of common stock, par value $100 a share. In 1903 its capital stock was increased to $100,000, consisting of 1,000 shares of common stock of the par value of $100 a share. All authorized stock was issued prior to 1905 for cash of $75,000 and tangible property of an aggregate cash value, when paid in for said stock, of $25,000.

2. The Foundation Company, hereinafter called the Delaware Company, was organized May 18, 1911, under the general corporation law of the State of Delaware, with an authorized capital stock of $2,100,000, consisting of 5,000 shares of preferred stock of the par value of $100 a share

and 16,000 shares of common stock of the par value of $100 a share. The Delaware Company was organized for the objects and purposes, among others, to engage in business as an engineering, contracting, and construction company. However, this corporation was, during all of the times hereinafter mentioned, only a holding company.

May 19, 1911, the Delaware Company issued all its preferred stock, par value of $500,000, to the order of the subscribers thereof, for cash of $500,000, which it then received. A list of the original purchasers of preferred stock is as follows:

| Purchaser | Number[1] | Purchaser | Number[1] |
|---|---|---|---|
| Franklin Remington | 475 | A. Monell | 200 |
| Edwin S. Jarrett | 475 | Charles D. Norton | 100 |
| John W. Doty | 475 | D. E. Pomeroy | 75 |
| Louis L. Brown | 475 | T. A. Gillespie | 25 |
| Daniel E. Moran | 475 | Charles H. Sabin | 50 |
| Edwin F. Kellogg | 125 | William P. Holly | 100 |
| C. D. Backus | 100 | F. I. Kent | 50 |
| E. L. Bell | 500 | Otis H. Cutler | 30 |
| F. N. B. Close | 25 | John H. Lewis | 70 |
| E. C. Converse | 200 | W. H. Porter | 100 |
| Wm. C. Heinkel | 250 | John H. Lewis | 25 |
| T. W. Lamont | 100 | Benj. Strong, Jr | 100 |
| F. Hoffman | 150 | John H. Lewis | 100 |
| William E. Lake | 50 | | |
| N. S. Meldrum | 25 | | 5,000 |
| Edgar L. Marston | 75 | | |

[1] Shares of preferred stock purchased.

3. On May 19, 1911, the 1,000 shares of plaintiff's stock then outstanding were held as follows:

| Stockholder | Number of shares held | Acquired and held since before |
|---|---|---|
| Franklin Remington | 190 | January 3, 1907. |
| Edwin S. Jarrett | 190 | May 3, 1905. |
| John W. Doty | 190 | January 8, 1910. |
| Louis L. Brown | 190 | January 8, 1910. |
| Daniel E. Moran | 190 | January 3, 1906. |
| Edwin F. Kellogg | 50 | September 3, 1908. |

**4.** May 19, 1911, the Delaware Company acquired all of the 1,000 shares of the then outstanding stock of plaintiff, from Franklin Remington (190 shares), Edwin S. Jarrett (190 shares), John W. Doty (190 shares), Louis L. Brown (190 shares), Daniel E. Moran (190 shares), and Edwin F. Kellogg (50 shares), and paid therefor by then

issuing all of the common stock of the Delaware Company of the par value of $1,600,000 and paying cash of $500,000 to said individuals or their nominees.

**5.** From 1905 to May 19, 1911, the stock of plaintiff could be sold only in accordance with the provisions of a certain stockholders' agreement. During that period and for some time thereafter this stock was closely held, was not listed on any exchange, and was not generally dealt in.

**6.** The capital and surplus of plaintiff for each of the years 1908, 1909, and 1910, arrived at without including as an asset any amount on account of patents, goodwill, or other intangible property, and the net income of the plaintiff for each of said years, were as follows:

| | Capital and surplus | Net income |
|---|---|---|
| 1908 | $10,481.59 | $250,645.51 |
| 1909 | 158,127.10 | 120,756.83 |
| 1910 | 223,883.93 | 21,804.41 |
| Total | 392,492.62 | 393,206.75 |

The capital and surplus of plaintiff on May 19, 1911, arrived at without including as an asset any amount on account of patents, goodwill, or other intangible property, were $500,000.

The intangible property of the plaintiff on May 19, 1911, if computed in accordance with A. R. M. 34 (2 Cumulative Bulletin 31), had a value at that time of $1,005,017.85, computed as follows:

| | |
|---|---|
| (1) Average net income for each of the calendar years 1908, 1909, and 1910 | $131,068.91 |
| (2) Fair return on average capital and surplus (exclusive of intangible property) for each of the calendar years 1908, 1909, and 1910 at 8 percent (0.08×$130,830.87) | 10,466.47 |
| (3) Average net income for each of the calendar years 1908, 1909, and 1910 attributable to intangible property for said years | 120,602.44 |
| (4) Average net income, item (3) above, capitalized at 12 percent | 1,005,017.85 |

**7.** May 17, 1917, the then stockholders of plaintiff filed in the office of the Secretary of State of the State of New York a certificate of reorganization of plaintiff, which recapitalized plaintiff and increased its authorized stock from $100,000, consisting of 1,000 shares of common stock, to $2,100,000, consisting of 5,000 shares of preferred stock of the par value of $100 a share, and 16,000 shares of common stock without par value.

**8.** In May 1917 plaintiff acquired all preferred stock of the Delaware Company of the par value of $500,000 from the preferred stockholders of the Delaware Company and paid therefor by then issuing all of its preferred stock of the par value of $500,000 and paying cash of $50,000 to the preferred stockholders of the Delaware Company. At the same time plaintiff issued all of its common stock, consisting of 16,000 shares without par value, to the holders of the common stock of the Delaware Company, for which plaintiff then received all of the common stock of the Delaware Company of the par value of $1,600,000.

**9.** May 31, 1917, plaintiff canceled its original common capital stock of the par value of $100,000. Until May 1917 this stock of plaintiff was continuously held by the Delaware Company. The Delaware Company was dissolved October 11, 1917.

**10.** All of the new common stock of plaintiff issued in 1917, as aforesaid, was outstanding on January 1, 1920, and during the entire calendar year 1920.

**11.** The Commissioner of Internal Revenue determined and held that plaintiff was not affiliated with the Delaware Company during the year 1917, within the purview of section 1331 of the Revenue Act of 1921, and finally determined their income and profits tax liability for 1917 accordingly. This decision is not questioned.

**12.** From January 1916 to May 19, 1917, the stock of the Delaware Company was bought and sold in New York as an unlisted stock. About May 19, 1917, the stock of the plaintiff began so to be bought and sold. William H. Quaw, for many years a dealer in securities, sold most of the stock of plaintiff and the Delaware Company that was traded in during 1917. Quaw traded approxi-

mately 20,000 shares of the Delaware Company and plaintiff stock during 1917 and approximately 20,000 shares of plaintiff's stock during each of the years 1918 and 1919. He merely acted as broker, and as such did whatever he could to balance the supply and demand; he did not fix or control prices at which the stock was traded; and the trading took place between willing buyers and sellers.

During a period of 12 months beginning July 1917 and during 1919 the stock of plaintiff traded in by William H. Quaw was actually bought and sold at prices per share ranging between the following bid and asked prices:

| | Preferred | | Common | |
|---|---|---|---|---|
| | Bid | Asked | Bid | Asked |
| During 1917-1918: | | | | |
| July | $90 | $95 | $51⅜ | $55 |
| August | 90 | 95 | 56.50 | 57⅝ |
| September | 90 | 95 | 60.25 | 67 |
| October | 90 | 95 | 60 | 67 |
| November | 90 | 95 | 57.50 | 62⅝ |
| December | 90 | 95 | 60 | 62.50 |
| January | 92.50 | 97.50 | 62.50 | 63 |
| February | 92.50 | 97.50 | 62.50 | 67.50 |
| March | 92.50 | 97.50 | 65 | 70 |
| April | 92.50 | 97.50 | 65 | 70 |
| May | 92.50 | 97.50 | 70 | 75 |
| June | 92.50 | 97.50 | 72.50 | 77.50 |
| During 1919: | | | | |
| January | 93.50 | 94 | 69.50 | 71 |
| February | ---------- | ---------- | 76.50 | 80 |
| March | 95 | 97.50 | 76.50 | 80 |
| April | 97.50 | 100 | 80 | 82 |
| May | ---------- | ---------- | 82.50 | 86 |
| June | ---------- | ---------- | 88 | 93 |
| July | ---------- | ---------- | 105 | 107.50 |
| August | ---------- | ---------- | 100 | 107.50 |
| September | ---------- | ---------- | 105 | 108.75 |
| October | ---------- | ---------- | 105 | 110 |
| November | ---------- | ---------- | 105.50 | 108.50 |
| December | ---------- | ---------- | 105 | 108.50 |

Quaw's first important brokerage transaction in stock of the Delaware Company was in January 1916 when he obtained a block of 3,000 shares of its common stock and sold it to a group of three buyers at $15.25 a share. The market for this stock was inactive at that time but by June 1916 the market became active, and the prices at which this stock was sold by or through Quaw in 1916, starting with $15.25 a share in January 1916, advanced two dollars a share during each month of 1916. The prices at which the capital stock of the Delaware Company was

sold during the period January 1 to May 1917 and at which the common stock of plaintiff was sold during the period May to July 1, 1917, by or through Quaw were between $40 and $50 a share.

**13.** The 16,000 shares common stock of the Delaware Company of the par value of $1,600,000, for which plaintiff in May 1917 issued all of its common stock consisting of 16,000 shares without par value, as hereinbefore mentioned, were acquired by the holders of the common stock of the Delaware Company to whom the common stock of plaintiff was issued, as follows:

| Number of shares of the Delaware Company | Date acquired | Cost of acquisition | Method of computation |
|---|---|---|---|
| 9, 778 | May 19, 1911 | $614, 192 | A part of the common capital stock of the Delaware Company originally issued by it as hereinbefore stated. The cost of acquisition of $614,192 represents $\frac{9,778,}{16,000}$ or 61.1125 percent of the value that was paid for the common stock of the Delaware Company by the plaintiff's stockholders on May 19, 1911, to wit, $1,505,017.85 (the then value of the plaintiff's stock) less $500,000 (the cash then received by plaintiff's stockholders).<br>Purchased for cash at a cost per share of not less than— |
| 720 | January 1916 | 10, 980 | $15. 25 |
| 20 | March 1916 | 385 | 19. 25 |
| 40 | April 1916 | 850 | 21. 25 |
| 342 | July 1916 | 9, 319 | 27. 25 |
| 100 | September 1916 | 3, 125 | 31. 25 |
| 150 | October 1916 | 4, 987 | 33. 25 |
| 22 | November 1916 | 775 | 35. 25 |
| 100 | December 1916 | 3, 725 | 37. 25 |
| 600 | January 1917 | 23, 550 | 39. 25 |
| 530 | February 1917 | 21, 862 | 41. 25 |
| 50 | March 1917 | 2, 162 | 43. 25 |
| 100 | August 1917 | 5, 650 | 56. 50 |
| 3, 448 | From July 14, 1911, to March 23, 1917. | ------------ | By transfer from others. |
| 16, 000 | | 701, 562 | |

**14.** The 5,000 shares of preferred stock of plaintiff of the par value of $500,000 were retired during 1917, 1918, and 1919 as follows:

| Year retired: | *Amount* |
|---|---|
| 1917 | $20, 500. 00 |
| 1918 | 37, 300. 00 |
| 1919 | 442, 200. 00 |
| Total | 500, 000. 00 |

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**15.** The certificate of incorporation of plaintiff was amended December 10, 1918, and its certificate of reorganization was amended August 21, 1919, and April 26, 1920, respectively. In accordance with the amendment of August 21, 1919, the authorized common stock of plaintiff was then increased from 16,000 shares to 20,000 shares without nominal or par value. Of this additional no par common stock there were issued 2,399 shares for cash of $263,890, and 1,601 shares in exchange for preferred stock of plaintiff. This preferred stock was acquired by plaintiff in 1919 in exchange for the retirement price thereof, to wit, $110 a share. All of the additional common stock of plaintiff was outstanding on January 1, 1920, and during the entire year 1920.

**16.** In accordance with the amendment of plaintiff's certificate of reorganization on April 26, 1920, its authorized common stock was then increased from 20,000 shares to 40,000 shares without nominal or par value. During 1920 plaintiff issued 2,498.75 shares of this additional common stock, without par value, for cash of $237,381.25, and 5,000 shares of said additional common stock, without par value, as a stock dividend.

**17.** Plaintiff filed its tax returns for 1917 to 1921, inclusive, and for 1924, 1925, and 1926, under the respective revenue acts applicable thereto, as follows:

| Year for which return was filed | Date filed | Tax shown on return |
|---|---|---|
| 1917 (original return) | March 30, 1918 | $205,568.92 |
| 1918 (tentative return) | March 15, 1919 | 300,000.00 |
| 1918 (original return) | June 17, 1919 | 260,036.49 |
| 1919 (tentative return) | March 15, 1920 | 235,000.00 |
| 1919 (original return) | August 19, 1920 | 517,632.68 |
| 1919 (amended return) | December 20, 1921 | 500,241.80 |
| 1920 (tentative return) | March 12, 1921 | None. |
| 1920 (original return) | April 11, 1921 | 139,222.43 |
| 1920 (amended return) | On or about Dec. 20, 1921 | 97,619.77 |
| 1921 (tentative return) | March 15, 1922 | 48,000.00 |
| 1921 (original return) | June 15, 1922 | 96,657.66 |
| 1924 (tentative return) | March 19, 1925 | 50,000.00 |
| 1924 (original return) | May 15, 1925 | 31,807.50 |
| 1925 (tentative return) | March 12, 1926 | None. |
| 1925 (original return) | May 3, 1926 | 77,416.14 |
| 1926 (tentative return) | March 15, 1927 | None. |
| 1926 (original return) | May 14, 1927 | 85,617.19 |

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The Commissioner in accordance with the returns assessed the following amounts for the years mentioned:

| Year: | *Amount* | Year: | *Amount* |
|---|---|---|---|
| 1917 | $205, 568. 92 | 1921 | $96, 657. 66 |
| 1918 | 260, 036. 49 | 1924 | 31, 807. 50 |
| 1919 | 517, 632. 69 | 1925 | 77, 416. 14 |
| 1920 | 139, 222. 43 | 1926 | 85, 617. 19 |

Plaintiff paid the taxes shown on the returns filed by it, to the then collector at New York, as follows:

| Date | *Amount* |
|---|---|
| Payments for 1917: | |
| June 12, 1918 | $205, 568. 92 |
| Payments for 1918: | |
| March 15, 1919 | 75, 000. 00 |
| June 17, 1919 | 55, 018. 25 |
| September 15, 1919 | 65, 009. 12 |
| December 15, 1919 | 65, 009. 12 |
| Total | 260, 036. 49 |
| Payments for 1919: | |
| March 17, 1920 | 58, 750. 00 |
| June 15, 1920 | 58, 750. 00 |
| September 15, 1920 | 150, 000. 00 |
| October 22, 1920 | 120, 724. 51 |
| January 21, 1921 | 50, 000. 00 |
| March 14, 1921 | 79, 408. 18 |
| Total | 517, 632. 69 |
| Payments for 1920: | |
| April 8, 1921 | 34, 805. 61 |
| August 10, 1921 | 34, 805. 61 |
| October 28, 1921 | 34, 805. 61 |
| May 16, 1922 | 13, 760. 35 |
| Overpayment of 1925 income taxes credited March 24, 1927 | 17, 218. 42 |
| Overpayment of 1924 income taxes credited March 24, 1927 | 3, 826. 83 |
| Total | 139, 222. 43 |

| Date | *Amount* |
|---|---|
| Payments for 1921: | |
| March 15, 1922 | $12, 000. 00 |
| June 15, 1922 | 36, 328. 83 |
| January 25, 1923 | 48, 328. 83 |
| Total | 96, 657. 66 |
| Payments for 1924: | |
| March 19, 1925 | 12, 500. 00 |
| June 11, 1925 | 3, 403. 75 |
| September 14, 1925 | 7, 951. 88 |
| December 10, 1925 | 7, 951. 87 |
| Total | 31, 807. 50 |
| Payments for 1925: | |
| March 12, 1926 | 10, 000. 00 |
| May 8, 1926 | 9, 354. 04 |
| June 15, 1926 | 19, 354. 03 |
| September 14, 1926 | 19, 354. 03 |
| December 15, 1926 | 19, 354. 04 |
| Total | 77, 416. 14 |
| Payments for 1926: | |
| March 15, 1927 | 15, 000. 00 |
| May 14, 1927 | 6, 404. 30 |
| June 15, 1927 | 21, 404. 30 |
| Sept. 14, 1927 | 21, 404. 30 |
| Dec. 14, 1927 | 21, 404. 29 |
| Total | 85, 617. 19 |

**18.** The Commissioner on his May 1921 list made an additional assessment of $88,123.35 for 1917. Of this amount plaintiff paid on Jan. 23, 1922, $50,000 to the then collector at New York and $175.07 was paid by a credit May 16, 1922, of an overpayment for 1916. The balance of $37,948.28 was abated August 9, 1927.

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**19.** January 12, 1924, plaintiff filed a waiver for 1918 extending the statute of limitation to June 17, 1925. February 25, 1925, plaintiff filed another waiver for 1918 as follows:

> This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with the said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

June 13, 1925, plaintiff filed a waiver for 1919, as follows:

> This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

December 22, 1925, plaintiff filed a waiver for 1920 and 1921, as follows:

> This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

**20.** May 10, 1923, plaintiff received from the Treasury Department a 30-day notice dated May 9, 1923, together with enclosures consisting of a statement and schedules 1 to

5, inclusive, which asserted an additional tax for 1918 aggregating $52,897.57. This notice was in part as follows:

> An examination of your income tax returns and of your books of account and records for the year discloses an additional tax liability for the year 1918 aggregating $52,897.57, as shown in detail in the attached statement.
>
> In accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. * * *
>
> Full details of the adjustments producing the above stated results are contained in the attached schedules 1 to 4, inclusive.

**21.** October 15, 1923, plaintiff received a 30-day notice dated October 13, 1923, together with enclosures consisting of a statement and schedules 1 to 12, inclusive, which asserted an additional tax for 1918 and 1919 aggregating $569,148.33 and $57,871.96, respectively. This notice was in part as follows:

> An examination of your income tax returns and of your books of account and records for the years 1918 and 1919 discloses an additional tax liability for the years 1918 and 1919 aggregating $627,020.29.
>
> In accordance with the provisions of section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and to show cause or reason why this tax or deficiency should not be paid.
>
> Full details of the adjustments producing the above-stated results are contained in the attached schedules 1 to 12, inclusive.
>
> The portion of this letter applicable to the year 1918, supersedes Bureau letter dated May 9, 1923.

**22.** August 25, 1924, plaintiff received a letter dated August 22, 1924, together with enclosures consisting of a statement and schedules 1 to 26 and A to D, which showed the Commissioner's determination of the net income and tax for 1917, 1918, and 1919. This letter was in part as follows:

> Reference is made to your request that your profits taxes for the years 1917, 1918, and 1919 be computed under the provisions of section 210 of the Revenue Act of 1917 and sections 327 and 328 of the Revenue Act of 1918, respectively.

Before consideration can be given your claims, there must be a final determination of your net income, therefore it will be necessary for you to advise this office within thirty days from the date of this letter, of your acquiescence in the following determination of your net income, or exceptions, if any, which you may take thereto.

| Company | Year | Net income |
|---|---|---|
| The Foundation Co., New York (consolidated) | 1917<br>1918<br>1919 | $570, 611. 67<br>966, 819. 61<br>959, 401. 51 |

The adjustments producing the above-stated results are contained in the attached schedules 1 to 26, inclusive.

The former action of the Bureau in allowing the expenses in connection with the International Nickel contract to be deducted from the gross income of the Foundation Company of New York has been reversed.

Said schedules showed taxes for 1917, 1918, and 1919 theretofore determined and assessed; additional proposed to be assessed and overassessed as follows:

| | 1917 | 1918 | 1919 |
|---|---|---|---|
| Total income and profits tax determined by Commissioner | $169, 189. 66 | $707, 659. 58 | $455, 010. 00 |
| Previously assessed | 293, 517. 20 | 260, 036. 49 | 517, 632. 68 |
| Overassessed | 100, 201. 42 | | 62, 622. 68 |
| Additional proposed to be assessed | | 447, 623. 09 | |

23. November 21, 1924, plaintiff received from the supervising internal revenue agent in New York City a copy of a revenue agent's report dated October 21, 1924, covering plaintiff's tax liability for 1920 and 1921. This report showed an overassessment for 1920 and 1921 aggregating $177,449.56, arrived at as follows:

| | 1920 | 1921 |
|---|---|---|
| Total income and profits tax liability as determined by revenue agent | None | $58, 430. 53 |
| Previously assessed | $139, 222. 43 | 96, 657. 66 |
| Overassessment | 139, 222. 43 | 38, 227. 13 |

Plaintiff received no letters from the Commissioner relating to the issues in these cases before January 1, 1926, other than those hereinbefore mentioned.

**24.** In 1925 plaintiff was engaged in incorporating certain of its foreign business, and in connection therewith certain public financing was done. In connection with this financing it was important to plaintiff to have its liability for Federal taxes cleared up before the end of 1925. Several months before December 31, 1925, plaintiff therefore made four or more requests of the Bureau of Internal Revenue to complete its fiscal audit and determination and close out the various tax years including 1918. December 8, 1925, plaintiff telegraphed to the Solicitor of Internal Revenue as follows:

> Income tax unit advises that our nineteen seventeen to nineteen nineteen tax cases were sent to your office last July for review and that said cases have not been returned to them. We will greatly appreciate any action taken to expedite these cases in your office. Delayed adjudication of our cases by Bureau has caused severe hardship and complicated pending reorganizations. Kindly wire us collect if our cases can be closed before the close of this year.

December 9, 1925, the Solicitor telegraphed plaintiff as follows:

> Your cases will be expedited as far as exigencies of the service will permit. No definite promise can be made that they will be closed before the end of the year.

**25.** December 22, 1925, the Commissioner made a jeopardy assessment of an additional tax of $447,623.09 for 1918 under and pursuant to the provisions of section 274 (d) of the Revenue Act of 1924. Notice and demand for the payment of this assessment was made upon plaintiff by the collector on December 28, 1925.

Plaintiff filed no claim for the abatement of any part of this assessment, and never filed or made a bond in connection therewith.

The following are the balance sheets of the plaintiff correctly showing its financial condition at December 31, 1923, 1924, and 1925.

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| | 1923 | 1924 | 1925 |
|---|---|---|---|
| ASSETS | | | |
| Current: | | | |
| Cash | $256,832.16 | $900,996.19 | $1,012,444.18 |
| Short-term securities | | | 1,006,831.22 |
| Accrued interest | | | 16,251.06 |
| Accounts receivable | 958,842.86 | 1,100,118.03 | 2,503,404.61 |
| Notes receivable | 103,359.74 | 134,244.79 | 77,778.14 |
| Advances on contracts in operation | 490,892.78 | 550,464.42 | 179,641.67 |
| Materials on hand | 391,043.52 | 413,513.86 | 473,437.58 |
| Prepaid, deferred, and accrued items | 16,434.08 | 16,351.06 | 14,028.64 |
| | 2,227,405.14 | 3,115,688.35 | 5,283,817.10 |
| Cash for liquidation of preferred stock | 24,000.00 | 27,882.86 | |
| Stock of affiliated companies | 424,235.44 | 713,156.84 | 1,452,720.90 |
| Other stocks and bonds | 172,490.50 | 170,121.50 | 197,518.50 |
| Real estate and buildings | 973,013.30 | 863,719.38 | 863,719.38 |
| Plant and equipment | 1,333,386.41 | 906,583.11 | 975,648.11 |
| Stock issue expense | | 225,000.00 | 125,000.00 |
| Goodwill and patents | 1,605,000.00 | 1,012,394.63 | 1,012,394.63 |
| | 6,759,530.79 | 7,034,546.67 | 9,910,818.62 |
| LIABILITIES | | | |
| Current: | | | |
| Notes payable | 770,000.00 | 450,000.00 | |
| Accounts payable | 367,248.01 | 252,937.65 | 911,788.34 |
| Accrued accounts | 2,629.15 | 4,762.12 | 1,954.17 |
| Reserve for taxes | 3,583.98 | 50,000.00 | 35,000.00 |
| | 1,143,461.14 | 757,699.77 | 948,742.51 |
| Mortgage on foundation building | 422,900.00 | 409,000.00 | 402,000.00 |
| Stated capital: | | | |
| Preferred | 905,000.00 | 331,700.00 | |
| Common | 1,795,000.00 | 4,056,100.00 | 6,795,000.00 |
| Surplus | 2,493,169.65 | 1,480,046.90 | 1,765,076.11 |
| | 6,759,530.79 | 7,034,546.67 | 9,910,818.62 |

**26.** In December 1925 plaintiff was able to pay the additional tax of $447,623.09 assessed for 1918. The only reason the additional tax for 1918 was assessed under section 274 (d) on December 22, 1925, was because the period of limitation for assessment and collection as extended by waiver would expire on December 31, 1925.

As a result of a telephone conversation with plaintiff's representative December 30, 1925, the Commissioner, on December 31, 1925, telegraphed to the collector of internal revenue for the Second District of New York at New York, as follows:

> Suggest you withhold collection four hundred forty-seven thousand six hundred twenty-three dollars nine cents assessed against Foundation Company Commissioner's December nineteen twenty-five list special fourteen for thirty days if interests of Government not jeopardized. Letter follows.

January 4, 1926, the Commissioner wrote to the Collector at New York, as follows:

> Reference is made to telegram of December 31, 1925, suggesting you withhold collection of an additional tax of $447,623.09, assessed for the taxable year 1918 against the Foundation Company, New York, New York, on the Commissioner's December 1925 list, special 14, page 0, line 0, for a period of thirty days if the interests of the Government are not jeopardized.
>
> This additional tax arises from the shifting of inventories from one taxable year to another. As a result of this adjustment, Certificates of Overassessment aggregating approximately $335,000.00 for the years 1917, 1919, and 1920 have been prepared and should be listed upon schedule within the next thirty days. A considerable amount of interest will, of course, be allowable upon these overassessments if there was an overpayment of taxes originally assessed. In addition, there appears to be an overassessment of a considerable amount for the taxable year 1921, which can probably be allowed soon after the allowance for 1917, 1919, and 1920 have been made.
>
> The additional tax for 1918 was assessed under section 274 (d) on December 22, 1925, as the period of limitation extended by waiver was about to expire.
>
> On December 30, 1925, the taxpayer called this office by long-distance telephone and protested that it should not be required to pay this additional tax or to file a claim in abatement accompanied by bond, since the assessment was due to the type of adjustment above described, and since the allowances could be certified to your office in the near future.
>
> In view of these circumstances, this office requested that collection of the additional tax be postponed for a period of thirty days if the interests of the Government are not jeopardized. Instructions are being issued that the certificates of overassessment should be listed on schedule within the next thirty days.

Plaintiff did not request or agree to any postponement of the collection of said additional assessment for 1918 and did not request or agree to the application of any overpayments which might be scheduled for any other year as credits or otherwise against said additional assessment for 1918.

**27.** March 3, 1926, plaintiff received from the Commissioner a 30-day notice dated March 2, 1926, together with

enclosures consisting of a statement and schedules, which showed the determination of the net income and tax liability of plaintiff for 1917, 1918, and 1919.

In schedule 14 the sum of $707,659.58 was shown as the tax previously assessed for 1918, and $38,593.17 as additional tax to be assessed for 1918.

July 13, 1926, plaintiff received from the Commissioner a notice dated July 13, 1926, in which the Commissioner's determination for 1917 and 1918, set out in his letter of March 2, 1926, was sustained.

**28.** February 25, 1927, plaintiff received from the Commissioner a 30-day notice dated February 23, 1927, showing a total tax for 1918 of $622,945.92 and an overassessment for 1918 of $84,713.66.

April 11, 1927, plaintiff received from the Commissioner a letter dated April 9, 1927, which showed overassessments for 1917, 1918, and 1919 of $70,469.29, $84,713.66, and $89,-260.26, respectively.

**29.** June 6, 1927, plaintiff appealed to the United States Board of Tax Appeals from the Commissioner's determination for 1918 as set forth in his notice of April 9, 1927. April 12, 1928, the Board of Tax Appeals dismissed the case for lack of jurisdiction. April 19, 1928, plaintiff waived the right under section 1001 of the Revenue Act of 1926 to file a petition to the Circuit Court of Appeals or the Court of Appeals of the District of Columbia from the decision of the Board of Tax Appeals dismissing the above proceeding for lack of jurisdiction.

**30.** The Commissioner in December 1926 assessed an additional tax of $5,391.12 for 1921, which was paid by credit of an overpayment of $5,391.12 for 1924.

**31.** June 7, 1928, plaintiff received from the Commissioner a certificate of overassessment showing an overassessment of $84,713.66 for 1918. This certificate was in part as follows:

| | |
|---|---|
| Tax assessed: | |
| Original no. 402782 | $260,036.49 |
| Additional, December 1925, page O, line O, special 14 | 447,623.09 |
| Total | 707,659.58 |
| Tax liability | 622,945.92 |
| Overassessment | 84,713.66 |

In a Bureau letter of recent date you were advised of the amount and manner of establishing your correct tax liability which resulted in the above computation.

The amount of the overassessment will be abated, credited, or refunded as indicated below.

Abated: $84,713.66.

**32.** July 5, 1929, plaintiff received from the Commissioner a certificate of overassessment showing an overassessment and overpayment of $103,529.52 for 1920. This certificate was in part as follows:

| | |
|---|---|
| Tax assessed April 1921 | $139, 222. 43 |
| Tax liability | 35, 692. 91 |
| Overassessment | 103, 529. 52 |

The adjustment of your tax liability as indicated above is in accordance with the recomputation made by the special advisory committee in connection with your appeal (Docket No. 20028) covering the year 1921.

The amount of the overassessment will be abated, credited, or refunded as indicated below.

Credited: $103,529.52 to 1918.

**33.** In addition to the foregoing certificates of overassessment plaintiff received from the Commissioner certificates of overassessment for 1917, 1919, and 1921 on July 5, 1929; for 1924 and 1925 on May 3, 1927; and for 1926 between March 6 and June 7, 1928.

**34.** The Commissioner signed schedules of overassessment for 1917, 1919, 1920, and 1921, inclusive, on May 31, 1929; for 1918 on May 7, 1928; for 1924 on March 24, 1927; for 1925 on March 24, 1927; and for 1926 on March 6, 1928.

The certificate for 1917 was in part as follows:

| | | |
|---|---|---|
| Tax assessed: | | |
| Original, March 1918, page 1239, line 13 | | $205, 568. 92 |
| Net additional, May 1921, page 12, line 36 | $87, 948. 28 | |
| Add: Credit applied, 1916 | 175. 07 | |
| | | 88, 123. 35 |
| Total | | 293, 692. 27 |
| Tax liability | | 223, 222. 98 |
| Overassessment | | 70, 469. 29 |
| Previously allowed | | 37, 948. 28 |
| Net overassessment | | 32, 521. 01 |

In Bureau letter of recent date you were advised of the amount and manner of establishing your correct tax liability which resulted in the above computation.

The amount of the overassessment will be abated, credited, or refunded as indicated below.

Credited: $32,521.01 to 1918.

The certificate for 1919 was in part as follows:

| Tax assessed: | |
|---|---|
| Original | $517, 632. 68 |
| Tax liability | 430, 438. 26 |
| Overassessment | 87, 194. 42 |

In the determination of this overassessment, the statements made in your claims for the refund of $625,-245.36 have been given careful consideration and to the extent not herein allowed were disallowed by the Commissioner as of the date of the schedule above noted.

The amount of the overassessment will be abated, credited, or refunded as indicated below.

Credited: $87,194.42 to 1918.

The certificate for 1921 was in part as follows:

| Tax assessed: | |
|---|---|
| June 1922 | $96, 657. 66 |
| December 1926 | 5, 391. 12 |
| Total | 102, 048. 78 |
| Tax liability | 76, 788. 09 |
| Overassessment | 25, 260. 69 |

The adjustment of your tax liability as indicated above is in accordance with the order of redetermination issued by the United States Board of Tax Appeals June 29, 1928, Docket No. 20028.

The amount of the overassessment will be abated, credited, or refunded as indicated below.

Credited: $25,260.69 to 1918.

The certificate for 1924 was in part as follows:

| | |
|---|---|
| Original tax assessed | $31, 807. 50 |
| Total tax liability | None |
| Overassessment | 31, 807. 50 |

The report of the internal revenue agent dated October 9, 1926, has been accepted by this office, with the change in this office of the disallowance of $4,700, donations to families of deceased employees.

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The amount of the overassessment will be abated, credited, or refunded as indicated below.

Credited: $3,826.83 to 12/8/20
Credited: $5,391.12 to tax. year 1921
Credited: $5,992.89 to tax. year 1918
Refunded: $16,596.66
Interest: $2,271.02.

The certificate for 1925 was in part as follows:

| | |
|---|---|
| Original tax assessed | $77,416.14 |
| Total tax liability | 60,197.72 |
| Overassessment | 17,218.42 |

The report of the internal revenue agent in charge dated October 9, 1926, has been adjusted in each year for the disallowance of $4,700.00, donations to families of deceased employees.

The amount of the overassessment will be abated, credited, or refunded as indicated below.

Credited: $17,218.42 to tax year 12/8/20.

The certificate for 1926 was in part as follows:

| | |
|---|---|
| Tax assessed, 1927 | $85,617.19 |
| Tax liability | 82,705.52 |
| Overassessment | 2,911.67 |

The basis of this overassessment is a revenue agent's report dated January 12, 1928, which has been approved in this office and accepted by you.

The amount of the overassessment will be abated, credited, or refunded as indicated below.

Credited: $2,911.67 to tax year 1918.

The overassessments and overpayments shown by the certificates above mentioned for 1917 to 1921, inclusive, and for 1924, 1925, and 1926 were abated or credited as follows:

| Overassessment and overpayment | Amount of | | Abated | Credited | | Refunded |
|---|---|---|---|---|---|---|
| Year | Overassessment | Overpayment | | Year to which credited | Amount | |
| 1917 | $70,469.29 | $32,521.01 | $37,948.28 | 1918 | $32,521.01 | None |
| 1918 | 84,713.66 | | 84,713.66 | | | None |
| 1919 | 87,194.42 | 87,194.42 | | 1918 | 87,194.42 | None |
| 1920 | 103,529.52 | 103,529.52 | | 1918 | 103,529.52 | None |
| 1921 | 25,260.69 | 25,260.69 | | 1918 | 25,260.69 | None |
| 1924 | 31,807.50 | 31,807.50 | | 1918<br>1920<br>1921 | 22,589.55<br>3,826.83<br>5,391.12 | None |
| 1924 | (1) | | | 1918 | 341.19 | None |
| 1925 | 17,218.42 | 17,218.42 | | 1920 | 17,218.42 | None |
| 1926 | 2,911.67 | 2,911.67 | | 1918 | 2,911.67 | None |

[1] Interest.

The certificate of overassessment for 1924 stated that of the overpayment of $31,807.50 for 1924, the amount of $16,596.66, together with interest thereon of $2,271.02, or a total of $18,867.68, was refunded to plaintiff by check dated April 29, 1927. Such check was never received by plaintiff, but was applied by the collector as a part of the credit of $22,589.55 to 1918 as shown in the above schedule.

The Commissioner never allowed and plaintiff never received any interest on any of the overpayments mentioned.

**35.** Of the sum of $447,623.09 for 1918 assessed by the Commissioner December 22, 1925, referred to in finding 25, the amount of $84,713.66 was abated, the amount of $274,348.05 was accounted for by credits of overpayments for other years, as aforesaid, and the balance of $88,561.38 was paid by the plaintiff in cash on September 14, 1929.

The Government made demand on plaintiff for interest on the balance of $88,561.38 at the rate of 12 percent per annum from date of assessment in December 1925, but such interest has not been paid, and the question of the right of the Government to collect interest on said balance of $88,561.38 is not in issue in these proceedings.

**36.** In arriving at the amount of $35,692.91 as the total tax liability of plaintiff for 1920, the Commissioner based his computation of tax upon a net income and an invested capital for 1920, as finally determined by him, of $295,440.55 and $1,262,345.60, respectively.

In determining this invested capital the Commissioner allowed only the amount of $360,000 for the property paid in for the 16,000 shares of common stock of plaintiff issued prior to 1918 and $440,000 for the cash and property paid in for the 4,000 shares of the common stock of plaintiff issued in 1919, or a total of $800,000 for the cash and other property paid in for the 20,000 shares common stock of plaintiff authorized and issued prior to and outstanding on January 1, 1920. Also, in determining invested capital in the amount mentioned, the Commissioner reduced the earned surplus for 1920 by the amount of $447,623.09, representing the additional tax assessed December 22, 1925, referred to in finding 25 herein.

The Commissioner reduced invested capital for 1920 by the amount of $205,053.55 on account of the income and profits tax liability for 1919.

**37. The invested capital of plaintiff for 1920, as reported** in its return for 1920 and as finally determined by the Commissioner, follows:

| | Return | Commissioner |
|---|---|---|
| Capital stock outstanding 12/31/19 (1,000 shares issued before 1/1/05 were retired in 1917): | | |
| 16,000 shares issued in 1917 | $360,000.00 | $360,000.00 |
| 4,000 shares issued in 1919 | 440,000.00 | 440,000.00 |
| 20,000 shares outstanding 12/31/19 | 800,000.00 | 800,000.00 |
| Earned surplus on 12/31/19 | 2,168,405.84 | 2,256,100.85 |
| Capital stock sold in 1920 (2,498¾ shares) | 79,491.43 | 80,140.02 |
| Total | 3,047,897.27 | 3,136,240.87 |
| Deduct: | | |
| Adjustment for intangibles | 1,105,000.00 | 1,158,965.75 |
| Additional income and profits tax for 1918 | | 447,623.09 |
| Income and profits tax for 1919 | 217,785.31 | 205,053.55 |
| Inadmissible assets | 157,502.72 | 62,252.88 |
| Total | 1,480,288.03 | 1,873,895.27 |
| Invested capital for 1920 | 1,567,609.24 | 1,262,345.60 |

The balance sheet of the plaintiff at December 31, 1919, as reported in the return for 1920 and as finally determined by the Commissioner follows:

| | Return | Commissioner |
|---|---|---|
| Patents | $5,000.00 | $611,059.63 |
| Less exhaustion | | 441,034.25 |
| Net value of patents | 5,000.00 | 170,025.38 |
| Good will | 1,600,000.00 | 996,989.29 |
| Total intangibles | 1,605,000.00 | 1,167,014.67 |
| Investment in uncompleted contracts | | 469,542.44 |
| Organization expense | | 5,131.55 |
| Excessive reserve for depreciation in return | | 25,761.50 |
| Other adjustments of assets | | 25,244.85 |
| Other tangible assets after depreciation | 2,362,803.91 | 2,362,803.91 |
| Total assets | 3,967,803.91 | 4,055,498.92 |
| Liabilities | 999,398.07 | 999,398.07 |
| Capital stock | 800,000.00 | 800,000.00 |
| Surplus | 2,168,405.84 | 2,256,100.85 |
| Total | 3,967,803.91 | 4,055,498.92 |

Of the aforesaid intangible property of plaintiff of the value of $1,005,017.85 on May 19, 1911, the patents had a value May 19, 1911, of $603,010.71.

These patents suffered depreciation during the period from May 19, 1911, to May 31, 1917, of $308,966.17, and during the period from May 31, 1917, to January 1, 1920, of $128,119.36, or an aggregate amount of $437,085.53 for the period from May 19, 1911, to January 1, 1920.

38. The Foundation Company of British Columbia, Ltd., hereinafter called British Columbia Company, was incorporated under the laws of the Dominion of Canada to engage in business as a construction company, its charter or certificate of incorporation having been filed in the office of the Secretary of State of Canada May 31, 1917. From organization until after December 31, 1920, plaintiff held and owned all of the issued and outstanding stock of the British Columbia Company of $3,500 par value.

August 31, 1918, the British Columbia Company entered into an agreement with the Government of the Republic of France, by which the former agreed to build for the French Government twenty wooden ships in accordance with certain specifications and for a price stated in said contract. This contract was negotiated by plaintiff and plaintiff supervised the construction of the ships. In connection with this service plaintiff and the British Columbia Company entered into an agreement on April 29, 1919, which was in part as follows:

> Whereas, the Foundation Company of British Columbia, Limited (hereinafter called the "Contractor"), entered into an agreement with the Government of the Republic of France, acting through Mr. L. Nicol, Director of Transportation of the French High Commission in U. S. (hereinafter called the "French Government"), dated August 31, 1918, by which the contractor agreed to build for the French Government twenty wooden ships in accordance with certain plans and specifications attached to said contract, the French Government agreeing in said contract to pay the cost of the ships as defined in said agreement; and
>
> Whereas, said contract with the French Government was negotiated by the Foundation Company, a corporation organized and existing under the laws of the State of New York, and after negotiating the same arranged with the French Government and the contractor that the agreement should be executed by the contractor and not by the Foundation Company; and

> Whereas, the Foundation Company has supervised and is supervising the construction of the ships agreed to be built by said agreement; and
>
> Whereas, the officers of the Foundation Company and of the contractor orally agreed that the contractor would pay or cause to be paid to the Foundation Company 75 percent of the net profits derived from said agreement between the contractor and the French Government.
>
> Now, therefore, the contractor and the Foundation Company hereby agree that the contractor will pay the Foundation Company 75 percent of the net profits derived from the building of said ships and that the net profits derived therefrom shall be arrived at by deducting from the total sum received for the building of said ships all the "Cost of the ships" as defined in said agreement of August 31, 1918, between the French Government and the contractor, and in addition thereto, the cost of a yard or yards, including shops, buildings, and other permanent equipment, and also after deducting all general expense and any and all other costs or expenses in connection with the said agreement which has been deemed necessary or expedient.
>
> The contractor agrees to pay the said 75 percent of the net profit arrived at in the manner hereinabove set forth so soon as it is in funds permitting it so to do.

The agreement with the Republic of France was performed and the ships therein called for were built without the United States.

June 23, 1920, plaintiff and the British Columbia Company entered into an agreement with respect to the profit derived by the latter from the contract with the French Government and the amount thereof to which plaintiff was entitled. This agreement was in part as follows:

> Whereas, the Foundation Company of British Columbia, Limited, and the Foundation Company, a corporation organized under the laws of the State of New York, entered into a certain agreement bearing date April 29, 1919, by which said agreement the Foundation Company of British Columbia, Limited, agreed to pay to the Foundation Company 75 percent of the profits derived from a certain contract for the building of twenty wooden ships for the French Government; and
>
> Whereas, the parties hereto have differed as to the amount of the profits, but desire to reach an amicable agreement,

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> Now, therefore, the parties hereto agree that the gross profits from the contract hereinabove referred to amounted to $1,000,000 and that the amount to be paid by the Foundation Company of British Columbia, Limited, to the Foundation Company is the sum of $750,000, and the Foundation Company has agreed to accept said sum in full settlement of the aforesaid contract dated April 29, 1919, as full compensation for all services rendered by it to the Foundation Company of British Columbia, Limited.

July 5, 1920, the British Columbia company filed with the Minister of National Revenue of the Dominion of Canada an income and profits tax return on the form prescribed for 1919. In this return the British Columbia company reported its accounting period as from December 31, 1918, to December 31, 1919; that it had no inventory on hand; that its paid-up capital stock at the commencement of said accounting period consisted of common stock of the amount of $3,500; and that the amount of $550 interest on Dominion of Canada war-loan bonds was credited to profit and loss account during the period. There was also reported in this return a net profit of $298,860.02 and surplus of $23,261.73, the surplus being arrived at as follows:

| | |
|---|---|
| Surplus at December 31, 1918, per last return | $27, 478. 91 |
| Less adjustment on surplus in 1919 representing expenses applicable to 1918 | 4, 217. 18 |
| Surplus per this return | 23, 261. 73 |

October 6, 1921, the British Columbia Company received from the Dominion of Canada a notice of assessment for the calendar year 1919. This notice was in part as follows:

> *Notice of assessment.*—Take notice that under the provisions of the above act you have been assessed as follows:
>
> Accounting period, 1st January 1919 to 31st December 1919.

| Capital | Net profits | Exemption | Net profits liable to assessment | Assessment (amount payable) |
|---|---|---|---|---|
| $26, 761. 73 | $483, 095. 26 | $2, 676. 17 | $480, 419. 09 | $120, 104. 77 |

*Assessment*

Period: 1st January 1919 to 31st December 1919.
Capital: As at 31st December 1918.

| | | |
|---|---|---|
| Capital stock | | $3,500.00 |
| Surplus | $27,478.91 | |
| Less adjustments | 4,217.18 | |
| | | 23,261.73 |
| Capital (total) employed | | 26,761.73 |
| Net profits: | | |
| Profit as per statement after deducting 1918 income tax | | 298,860.02 |
| Add commission for obtaining contract and fee for supervising the carrying out thereof | $750,000.00 | |
| Less proportion of overhead and supervision | 514,025.84 | |
| | | 235,974.16 |
| | | 534,834.18 |
| Less: | | |
| Interest on Victory bonds | 550.00 | |
| Loss on realization over and above amount set aside | 51,188.92 | |
| | | 51,738.92 |
| Net profit | | 483,095.26 |
| Exemption 10% of capital employed | | 2,676.17 |
| Taxable profit | | 480,419.09 |
| Assessment 25% | | 120,104.77 |

**39.** October 24, 1921, the British Columbia Company issued its certified check for $60,000, payable to the Receiver General of Canada in part payment of its income and profits tax liability to the Dominion of Canada for 1919, and on October 26, 1921, the Commissioner of Taxation of Canada acknowledged receipt thereof.

The British Columbia Company issued its checks for the balance of the income and profits tax assessed for 1919, as follows:

| | |
|---|---|
| May 16, 1922 | $30,000.00 |
| October 21, 1922 | 10,000.00 |
| January 30, 1923 | 20,104.77 |

The Commissioner of Taxation of Canada thereafter acknowledged receipt of said amounts.

**40.** The accumulated profits of the British Columbia Co., amounted to $23,261.73 on December 31, 1918, and $272,-121.75 on December 31, 1919. The entire accumulated profit

as of December 31, 1919, was derived by it from sources without the United States. All of the income of this company for 1919 was derived by it from its contract with the Government of the Republic of France. The amount of $298,860.02 reported by the Foundation Company of British Columbia, Ltd., in the return filed in the Dominion of Canada was arrived at without deducting any amount for income and profits taxes for 1919. Of the total assessment of $120,104.77 referred to above, the amount of $61,111.25 was paid by the Foundation Company of British Columbia, Ltd., on taxable net income of $244,444.93 realized by it in 1919, and $58,993.54 was paid by plaintiff on taxable net income of $235,974.16 realized by plaintiff in 1919. All amounts hereinbefore mentioned in this paragraph are stated in Canadian dollars. On December 31, 1919 and 1920 Canadian dollars were convertible into dollars of the United States of America at the prevailing exchange rates of $0.9175 and $0.86, respectively.

The books and records of plaintiff and Foundation Company of British Columbia, Ltd., respectively, have since before January 1, 1919, been consistently kept on the accrual basis.

**41.** During 1920 plaintiff received dividends of $150,000 from the British Columbia Company from profits realized by that company prior to 1920.

The entire net income of $295,440.55 of plaintiff for 1920 as finally determined by the Commissioner included said dividends of $150,000.

Plaintiff filed with the Commissioner Form 1118 "Claim for credit on income and profits tax return of domestic corporation for taxes paid or accrued to foreign countries or to possessions of the United States" required by the revenue acts with respect to taxes paid by it and the British Columbia Company, respectively, to the Dominion of Canada for 1919.

**42.** In determining the amount of $35,692.91 as the tax liability of plaintiff for 1920, the Commissioner credited the taxes imposed upon the plaintiff for 1920 by the Revenue Act of 1918 with $35,778.29 on account of taxes paid by plaintiff to the Dominion of Canada for 1919. The foreign

tax credit in issue in this case is for $34,406.25 on account of taxes paid by the British Columbia Company, plaintiff's subsidiary, to the Dominion of Canada in addition to the foreign tax credit allowed plaintiff by the Commissioner for foreign taxes accrued on plaintiff's income for 1920.

All tax laws and statutes of the Dominion of Canada, including the business profits war tax act, 1916, of the Dominion of Canada, together with all amendments thereto, and the income war tax act, 1917, of the Dominion of Canada, together with all amendments thereto, have been stipulated.

**43.** Plaintiff filed claims for refund for 1917, 1919, 1920, and 1921, together with interest as follows:

| Claim filed | Year | Refund claimed |
|---|---|---|
| February 28, 1923 | [1] 1917 | $293, 692. 24 |
| October 29, 1923 | [2] 1917 | 88, 123. 32 |
| February 10, 1925 | 1919 | 262, 622. 68 |
| March 12, 1926 | 1919 | 362, 622. 68 |
| March 12, 1926 | 1920 | 139, 222. 43 |
| March 24, 1927 | 1920 | 139, 222. 43 |
| March 12, 1926 | 1921 | 96, 657. 66 |
| March 24, 1927 | 1921 | 100, 000. 00 |

[1] Original taxes.
[2] Additional taxes.

The overassessments and overpayments shown by certificates of overassessment hereinbefore mentioned for 1917, 1919, 1920, and 1921 were allowed by the Commissioner upon claims made and grounds set out in the respective refund claims filed for said years.

The refund claims for 1920 set forth, among other grounds, that invested capital for 1920 should be increased to include the cost and actual cash value of tangible property *bona fide* paid in for stock or shares of plaintiff disallowed by the Commissioner in the amount of $1,600,000; that invested capital for 1920 should be increased to include the amount of $447,623.09, by which the Commissioner reduced invested capital by reason of the alleged additional tax for 1918 assessed by him against plaintiff; that invested capital for 1920 should be reduced on account of the tax liability of plaintiff for 1919 by an amount based only upon the actual amount of such tax liability as finally

determined and that invested capital should be increased to include the amount of reduction made by the Commissioner in excess of the correct reduction; and that the tax imposed upon plaintiff for 1920 should be credited with the amount of $33,686.59, omitted in the return but now claimed, by reason of income and war profits taxes of $61,111.23 paid by Foundation Company of British Columbia, Ltd., as aforesaid.

**44.** April 30, 1932, plaintiff filed claim for refund of $362,909.43 paid for 1918, together with interest due thereon, for reasons in part as follows:

> Because (1) the alleged jeopardy assessment of additional income and profits taxes against the Foundation Co., the taxpayer herein, for the taxable year 1918 is void, and the collection from the taxpayer of any income and profits taxes for 1918 was therefore barred after December 31, 1925, by the statute of limitations properly applicable thereto, * * * the taxpayer is entitled to the refund of the amount of $362,909.43, with interest which it paid, under protest and duress, on or about May 31, 1929, as alleged additional income and profits taxes for 1918.

**45.** After September 10, 1932, the Commissioner rejected the refund claim for 1918, and stated his reasons therefor in part as follows:

> Your claim for the refund of $362,909.43, income and profits taxes for the year 1918, has been examined and will be rejected for the following reasons.
>
> The claim is based upon the following contentions:
>
> (*a*) The collection of the deficiency in tax of $362,909.43 was barred by the statute of limitations.
>
> (*b*) Additional relief should be allowed under the provisions of section 328.
>
> (*c*) Net income should be reduced by $76,666.66, representing commissions applicable to the year 1918 but not paid until 1928.
>
> In connection with your contention that the collection of the above deficiency was barred by the statute of limitation you are advised that records of the Bureau disclose the following facts:
>
> In January 1924 a waiver was filed extending the statute of limitation for assessment of any deficiency to one year after the statute of limitations ran or until

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June 17, 1923. In February 1925 a second waiver was filed extending the statute until December 31, 1925.

In December 1925 the Commissioner assessed a deficiency of $447,623.09 under the provisions of section 274 (d) of the Revenue Act of 1924 due to the fact that the statute as extended by the above-mentioned waivers was about to expire. After the consideration of additional facts submitted the above deficiency was reduced to $362,909.43 and the difference of $84,713.66 was abated on schedule IT 29907, May 25, 1928.

Under date of April 9, 1927, the Commissioner mailed to the taxpayer a formal notice of deficiency in the amount of $362,909.43. An appeal was filed with the United States Board of Tax Appeals within the prescribed time and under date of April 12, 1928, the Board issued an order dismissing the petition for lack of jurisdiction.

On May 31, 1929, the above deficiency was paid to the Collector of Internal Revenue.

You are advised that section 278 (d) of the Revenue Act of 1924 reads as follows:

"Where the assessment of the tax is made within the period prescribed in section 277 or in this section such tax may be collected by distraint or by a proceeding in court begun within six years after the assessment of the tax."

Inasmuch as the tax in question was assessed in December 1925 and paid in May 1929 the Bureau holds that the collection was timely and made within the time as prescribed by section 278 (d) of the Revenue Act of 1924.

The court decided that plaintiff was entitled to recover in case M–155, but was not entitled to recover in case No. 42394.

LITTLETON, *Judge*, delivered the opinion of the court:

The sole question relating to the year 1918 involved in case No. 42394 is whether a jeopardy assessment of an additional tax made by the Commissioner on December 22, 1925, under Section 274 (d) of the Revenue Act of 1924, was illegal and void under the facts and circumstances disclosed by the record. While the tax liability of plaintiff for this year was under consideration by the Commissioner plaintiff executed waivers of the statute of limitation, in the last

of which the time within which the Commissioner might assess any additional tax found due was extended to December 31, 1925, and for an additional period of 60 days thereafter if a deficiency notice was mailed under Section 274 (a) of the Revenue Act of 1924 and no appeal was taken to the Board of Tax Appeals, and by the number of days between the mailing of a deficiency notice and the final decision by the Board if a deficiency notice should be mailed under Section 274 (a) and an appeal taken to the Board.

In December 1925 the Commissioner was engaged in auditing plaintiff's tax liability for 1918 and had not reached a final decision with respect thereto for the reason that at the same time he was considering the tax liability of plaintiff for other years, and the questions involved in all of these years related to inventory and invested capital adjustments. As a result of this situation the Commissioner, because of the approaching expiration of the statute of limitation on assessment as extended by the waivers, made a jeopardy assessment on December 22, 1925, of an additional tax of $447,623.09 for 1918 under section 274 (d) of the Revenue Act of 1924. After notice and demand for payment had been served by the collector a telephone conversation took place between plaintiff and the Commissioner, as a result of which immediate collection of the assessment was postponed by the collector at the suggestion of the Commissioner, and plaintiff did not file any claim for abatement or bond. Plaintiff was fully able to pay any tax found to be due and the Commissioner did not make the jeopardy assessment because of any apprehension or belief on his part that collection of the tax would be jeopardized by the inability of the plaintiff to pay the amount which appeared at that time to be due. The Commissioner made the jeopardy assessment because he had not been able to reach a final decision as to the exact amount due and could not do so before December 31, 1925, when the statute of limitation would bar assessment and collection of any amount for 1918, unless a jeopardy 60-day deficiency notice was mailed under section 274 (a) or a jeopardy assessment was made under section 274 (d) of the Revenue Act of

1924. The matter of the correct tax liability for 1918 and also the tax liability for the years 1917 to 1926, inclusive, was thereafter considered by the Commissioner until he reached his final decision with respect thereto. The final decision of the Commissioner was that plaintiff owed an additional tax of $362,909.43 for 1918, all of which, except $88,561.38, was collected by credits of overpayments determined and allowed for the years 1917 and 1919 to 1921, inclusive, and for 1924 and 1926.

We are unable to concur in plaintiff's contention that the court may review the Commissioner's determination that a jeopardy assessment for 1918 should be made. The decisions of the United States Board of Tax Appeals and of the courts are uniform that the matter of whether he should make an additional assessment before he has reached a final decision with respect to the correct tax liability for any year is by the statute left wholly to the Commissioner, and that his belief, evidenced by such an assessment, cannot be inquired into by the court for the purpose of determining whether he was justified in believing that assessment or collection of the tax would be jeopardized if the assessment were delayed, or whether he should have pursued a different course that may also have been authorized by the statute. *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551; *California Associated Raisin Co.*, 1 B. T. A. 1251; *Oakdale Coal Co.*, 1 B. T. A. 773; *W. S. Tyler*, 9 B. T. A. 255; *James Couzens*, 11 B. T. A. 1040; *Veeder* v. *Commissioner*, 10 B. T. A. 884, 36 Fed. (2d), 342; and *Manz* v. *United States*, 74 C. Cls. 5, 13. Counsel for the plaintiff makes a very thorough and interesting argument with reference to jeopardy assessments and the mailing of deficiency notices which is based upon the provisions and history of the Revenue Acts of 1921 and 1924 concerning determinations, assessments, and appeals with respect to taxes in excess of amounts shown upon returns filed. However, we are unable to find anything in this argument to convince us that a court may inquire into the matter of whether the Commissioner during his consideration and audit was justified in believing that an additional assessment should be

made in order that collection of any additional tax finally determined to be due for the year or years under consideration might not be jeopardized. Section 274 (a) and (d) provide as follows:

> (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.
>
> (d) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided in subdivision (a) of this section, or (2) before the expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or (3) at any time prior to the final decision by the Board upon such deficiency even though the taxpayer has filed an appeal. If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed (or, if the claim so filed covers only a part of the deficiency, then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

The quoted section contemplates that when the Commissioner has reached a final decision as to the tax liability for any year he shall, if the tax determined is greater than that shown on the return and he concludes that there is no reason to believe that assessment or collection of the tax will be jeopardized by delay, mail a deficiency notice from which the taxpayer may, within sixty days thereafter, take the case to the Board of Tax Appeals for hearing and decision by that tribunal before payment. The section also contemplates that if, for any reason, the Commissioner believes that assessment or collection of any additional tax will be jeopardized by delay in making an assessment, he

shall make an immediate assessment without mailing a sixty-day deficiency notice if he has not completed his consideration and reached a final decision, and that such sixty-day notice shall be given when he has completed his audit and made a final determination of the amount due. From this final notice the taxpayer may, if he has otherwise complied with the statute, take the case before the Board of Tax Appeals. *Joseph Garneau Co., Inc.*, 1 B. T. A. 75; *Terminal Wine Co.*, 1 B. T. A. 697. In addition section 274 expressly provides that although the sixty-day deficiency notice has been mailed, the Commissioner shall make an immediate assessment before an appeal is filed with the Board if he believes that the assessment or collection of the tax will be jeopardized by delay of assessment, and if no abatement claim is filed the amount so assessed shall be collected. The Commissioner is also authorized by this section to make such jeopardy assessment after an appeal has been taken to the Board of Tax Appeals and before that tribunal has decided the case. In the case at bar the Commissioner was clearly authorized to pursue any or all of the courses specified, but the fact that he followed one rather than another did not render his action illegal or arbitrary and subject to review by the court. It is admitted that assessment and collection of any tax for 1918 would have been barred within nine days if the Commissioner had not made the jeopardy assessment when he did, or if he had not ended his audit and consideration of the case by preparing and mailing to the plaintiff a sixty-day deficiency notice of his final determination in respect of the tax liability for 1918.

The circumstances disclosed by the record indicate that the Commissioner, in making the jeopardy assessment, was endeavoring to comply with plaintiff's urgent request that the questions involved in the several years under consideration be expedited and finally determined as soon as possible (finding 24). By simply making a jeopardy assessment for 1918 under section 274 (d) in order to protect the tax against the bar of the statute of limitation by reason of plaintiff's failure to offer an additional waiver—instead of

mailing a jeopardy sixty-day deficiency notice under section 274 (a)—the Commissioner kept the year 1918, as well as other years, before him so that he could proceed therewith to a complete and final adjudication of all the matters in controversy, including special assessment, and close the cases by finally determining the tax liability for 1918 and scheduling the overpayments for other years. Both the Commissioner and the plaintiff were aware at that time that plaintiff had the right to have the final decision as to any year in which a deficiency, as defined by the statute, was determined, reviewed by the Board of Tax Appeals even though a jeopardy assessment had been made. However it was obvious that there would be great delay if the year 1918 was forced into the Board of Tax Appeals in the condition in which it was on December 22, 1925. Time would have been required to prepare and file a petition and the answer of the Commissioner, and to prepare for trial and to try the case before the Board. In the meantime the overpayments for the years 1917 to 1926 would have been held up pending a decision of the Board as to the amount of additional tax due for 1918. If it be said that the Commissioner could have mailed a jeopardy sixty-day deficiency notice and continued with his consideration of the case, the answer is that he was not required to do so, and the legislative history of the Revenue Act of 1926 discloses that this practice was not adopted to any extent until about 1927 when the special advisory committee was organized pursuant to the Revenue Act of 1926. Cf. *Laurence R. Connor, et al., Trustees*, v. *United States*, 82 C. Cls. 476, 13 F. Supp. 455.

The making of the jeopardy assessment did not deprive plaintiff of any legal rights with respect to the tax for 1918 or any of the other years under consideration, and the only reason plaintiff's appeal to the United States Board of Tax Appeals from the Commissioner's final determination on April 9, 1927, for 1918 was not considered and decided by the Board on its merits was because plaintiff had not filed a claim for abatement and bond for the tax theretofore assessed by the Commissioner. But the fact that a

bond was necessary in order that plaintiff might have the merits of the Commissioner's final determination reviewed by the Board cannot affect the legality of the assessment made under section 274 (d) of the Revenue Act of 1924. The procedure followed by the Commissioner was expressly authorized by law and the statute expressly provided for both the assessment and the bond. The Commissioner was not bound to select one course of procedure in preference to another merely because the course which he did not pursue might have better pleased the taxpayer. Moreover, at the time the jeopardy assessment was made the Commissioner, as it appears under the facts and circumstances, was not in a position to mail a sixty-day deficiency notice under section 274 (a) disclosing a considered and accurate determination with respect to the tax liability for 1918, for the reason, as disclosed in his letters to plaintiff, that income and invested capital for 1918 were affected by inventory adjustments involved for a prior year and the tax for subsequent years under consideration was affected by inventory and invested capital adjustments for 1918. Although the Commissioner might have done so, it seems clear from the provisions of section 274 (a) that it was not contemplated that the Commissioner should mail sixty-day jeopardy deficiency notices in cases where he had not completed his audit and made a considered determination as to the tax liability for the year involved, thereby clogging the docket of the U. S. Board of Tax Appeals with ill-considered cases.

For the foregoing reasons plaintiff is not entitled to recover any portion of the additional tax assessed and collected for 1918 or the overpayments allowed for other years involved in case No. 42394.

The remaining questions arise in case M–155, in which plaintiff seeks to recover an additional overpayment of $35,692.91 for 1920 and interest of $1,929.83 on an overpayment allowed for 1924. Plaintiff paid $139,529.52 by cash and credit for 1920. The Commissioner determined an overpayment of $103,529.52 which was applied as a credit against the additional tax assessed for 1918. In

this determination the Commissioner fixed the correct tax of plaintiff for 1920 at $35,692.91 and plaintiff seeks to recover this amount with interest. The foregoing decision that the additional tax for 1918 was timely assessed disposes of plaintiff's claim that it is entitled to recover the 1920 overpayment allowed by the Commissioner on the ground that the 1918 tax against which it was credited was barred. Plaintiff contends however, that the tax for 1920 was overpaid in the amount of $35,692.91 in excess of the overpayment allowed by the Commissioner. The alleged additional overpayment for 1920 is based upon the claims (1) that invested capital for 1920 should be increased in the amount of $341,562 in excess of that allowed by the Commissioner by reason of the acquisition by plaintiff in May 1917 of stock of the Foundation Company, a Delaware corporation, as disclosed in findings 2 to 16 inclusive; (2) that an additional credit of $34,406.25 should have been allowed against the 1920 tax by reason of certain income and profits taxes paid by a wholly-owned subsidiary of plaintiff to the Dominion of Canada; and (3) that invested capital for 1920 was erroneous and excessively reduced on account of 1918 and 1919 taxes.

In addition to the above, plaintiff seeks to recover an item of interest of $1,929.83 alleged to have been allowed but not refunded.

With reference to the invested capital, item (1) above, the issue is the amount which plaintiff is entitled to include in its invested capital for 1920 on account of certain transactions between itself and another corporation of the same name but incorporated under the laws of another state, and the stockholders of the two corporations. Plaintiff was incorporated under the laws of New York and the other corporation under the laws of Delaware.

Plaintiff was organized in 1902 at which time common stock was issued of a par value of $50,000. In 1903 it issued additional stock of the same par value, thus making its stock outstanding $100,000. All of the stock was issued for cash and tangible property of an aggregate cash value equal to the par value of such stock. The same stock was

outstanding in 1911 when the first transactions took place between plaintiff and the Delaware Company and the stockholders of the two corporations, as hereinafter shown.

The Delaware Company was organized May 18, 1911, with an authorized capital stock of $2,100,000, consisting of 5,000 shares of preferred stock of a par value of $100 a share and 16,000 shares of common stock of a par value of $100 a share. May 19, 1911, the Delaware Company issued all of its preferred stock (par value, $500,000) for $500,000 in cash, to certain individuals, six of whom owned all the stock of plaintiff and received one-half of the preferred stock of the Delaware Company. On the same day the Delaware Company issued all of its common stock to the stockholders of plaintiff for all the stock of plaintiff, par value of $100,000, and, in addition, paid to such stockholders $500,000 in cash. It will thus be seen that after this transaction was completed the Delaware Company was the sole stockholder of plaintiff and that condition continued until May 1917 when the situation was reversed and plaintiff acquired the stock of the Delaware Company, as will be shown below.

May 17, 1917, plaintiff secured an authorization to issue 5,000 shares of preferred stock of a par value of $100 a share and 16,000 shares of common stock without par value in lieu of its existing stock of 1,000 shares of common stock of a par value of $100 a share. Then, or shortly thereafter, in May 1917, plaintiff issued its preferred stock of $500,000 to the stockholders of the Delaware Company for like stock of a like par value, and, in addition, paid $50,000 to the preferred stockholders of the Delaware Company. At or about the same time in May 1917, plaintiff issued all of its common stock of 16,000 shares to the common-stock holders of the Delaware Company for the latter Company's common stock of a par value of $1,600,-000. Likewise at or about the same time plaintiff canceled the stock of the Delaware Company and its original stock of a par value of $100,000, and shortly thereafter dissolved the Delaware Company.

Opinion of the Court

Plaintiff's contention is that the transaction in 1917 gave rise to a situation where pursuant to section 326 (a) (2)[1] of the Revenue Act of 1918 and subject to the limitation of section 331[2] of the same act it is entitled to have included in invested capital the actual cash value of the stock of the Delaware Company at the time paid in for stock of plaintiff in 1917, but not in excess of the cost of such stock to the previous owners. The Commissioner has admittedly given proper recognition to all costs for things paid in to plaintiff other than on account of the 1917 stock transaction and has made proper adjustment on account of preferred stock. The question here presented is whether that which occurred in 1917 gave rise to an increase in plaintiff's invested capital on account of the market value attaching to the Delaware stock at the time plaintiff's new stock was issued therefor.

We are of opinion that the claim for additional invested capital on this account is without merit. Nothing occurred in 1911 which gave rise to an increase in plaintiff's invested capital since in that year the Delaware Company was formed and in a circuitous transaction became the holding company of plaintiff, having at its conclusion $500,000 of

[1] (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section) :

* * * * * * *

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus. * * *

[2] In the case of the reorganization, consolidation, or change of ownership of a trade or business, or change of ownership of property, after March 3, 1917, if an interest or control in such trade or business or property of 50 percentum or more remains in the same persons, or any of them, then no asset transferred or received from the previous owner shall, for the purpose of determining invested capital, be allowed a greater value than would have been allowed under this title in computing the invested capital of such previous owner if such asset had not been so transferred or received: *Provided*, That if such previous owner was not a corporation, then the value of any asset so transferred or received shall be taken at its cost of acquisition (at the date when acquired by such previous owner) with proper allowance for depreciation, impairment, betterment, or development, but no addition to the original cost shall be made for any charge or expenditure deducted as expense or otherwise on or after March 1, 1913, in computing the net income of such previous owner for purposes of taxation.

preferred stock and $1,600,000 of common stock outstanding and having as the asset back of this stock the entire stock of plaintiff, par value $100,000. Obviously, there was not thereby anything paid in to plaintiff.

The Delaware Company continued to hold plaintiff's stock until May 1917, when the situation was reversed. At that time plaintiff secured an authorization by which it issued $500,000 of preferred stock to the preferred stockholders of the Delaware Company for preferred stock of the same par value and at the same time issued 16,000 shares of common stock without par value to the comman-stock holders of the Delaware Company for common stock of a par value of $1,600,000. Plaintiff then canceled all of the Delaware Company stock, its own original stock of $100,000, and shortly thereafter dissolved the Delaware Company. From this we find nothing being paid in or coming to plaintiff in the form of statutory invested capital. It would be legalistic fiction to say that anything was thereby paid to plaintiff. Nothing came to it but stock of the Delaware Company which had back of it the original stock of plaintiff and both were immediately erased from the picture, leaving plaintiff where it started, insofar as anything being paid in is concerned, except for the fact it had increased its stock from common stock of $100,000 to preferred stock of $500,000 and common stock of 16,000 shares, without par value. Recognition of an increase in invested capital in such circumstances would thwart the purpose of sections 326 and 331 and would be contrary to the principles laid down in *La Belle Iron Works* v. *United States*, 256 U. S. 377, and subsequently followed. *Regal Shoe Co.*, 1 B. T. A. 896, and *United Cigar Stores of America* v. *United States*, 62 C. Cls. 134, and other cases based thereon, cited by plaintiff, did not involve comparable facts and cannot be considered controlling in the situation here presented. Plaintiff cannot therefore recover on this point.

With reference to the claimed additional credit of $34,-406.25 in excess of the amount of $35,778.29 allowed by the Commissioner, the facts show that during 1920 and prior thereto plaintiff owned all the stock of the Foundation Company of British Columbia, Ltd., a corporation of

the Dominion of Canada. The Canadian corporation paid to the Dominion of Canada during 1921 and 1922 income and profits taxes of $61,111.25 on a net taxable income of $244,444.93 derived from sources without the United States. This amount was income of the Canadian corporation in 1919 and the aforesaid tax was paid by the Canadian Company on such income. The net income of plaintiff for 1920 as finally determined was $295,440.55, which included dividends of $150,000 received by it from the Canadian Corporation, which were not deductible under section 234 of the Revenue Act of 1918. These dividends were paid by the Canadian Company from profits realized by it prior to 1920. Both the Canadian Company and plaintiff employed the accrual method of accounting in keeping their books.

Plaintiff contends that inasmuch as the accrual method of accounting was used, it is entitled to a foreign tax credit of $34,406.25 against its tax for 1920 on account of the above-mentioned tax of $61,111.25 paid by the Canadian Corporation to the Dominion of Canada, and this claimed credit is based upon the provisions of sections 238 and 240 of the Revenue Act of 1918 and section 238 of the Revenue Act of 1921. The Commissioner allowed plaintiff a foreign tax credit of $35,778.29 for 1920 on account of a tax of $58,993.54, which it paid to the Dominion of Canada, in respect of its income for 1919 but disallowed the claimed credit of $34,406.25 due the Dominion of Canada from the British Columbia Company, plaintiff's subsidiary, for the reason that the tax of the Canadian Corporation upon which the claimed credit was based was not *paid* to the Dominion of Canada until subsequent to 1920. In this we think the Commissioner was correct. Section 238 (a) of the Revenue Act of 1918 provided for a credit of the amount of any tax paid during the taxable year to any foreign country upon income derived from sources therein, and section 240 (c), in providing how the credit to be allowed to a domestic corporation affiliated with a foreign corporation should be determined, provided that—

> For the purposes of section 238 a domestic corporation which owns a majority of the voting stock of a foreign corporation shall be deemed to have paid the

> same proportion of any * * * taxes paid (but not including taxes accrued) by such foreign corporation during the taxable year to any foreign country * * * upon income derived from sources without the United States, which the amount of any dividends (not deductible under section 234) received by such domestic corporation from such foreign corporation during the taxable year bears to the total taxable income of such foreign corporation upon or with respect to which such taxes were paid.

The provisions of section 238 (a) relate to credits for taxes paid to a foreign country by a domestic corporation. In that section the word "paid" means paid or accrued. The Commissioner allowed plaintiff the credit provided for in that section on account of that portion of the foreign tax accrued or which was paid by plaintiff. However, section 240 (c) provided a different rule with respect to taxes "paid" by a foreign subsidiary of a domestic corporation. In such a case taxes accrued but not paid are specifically excluded as a credit by the statute. The actual payment to the foreign country is made the test of the credit. The Revenue Act of 1921 provided a different rule with respect to such credits but that act was not retroactive and had no application to the year 1920.

With reference to the claimed interest of $1,929.83 for 1924 which is sought to be recovered on the ground that it was shown on the certificate of overassessment for 1924 and neither credited nor refunded, it appears that the Commissioner determined an overpayment of $31,807.50 for 1924, of which $22,589.55 was credited to 1918 and the balance to the tax of plaintiff as then determined for 1920 and 1921. The overpayment and the credit were allowed after the enactment of section 1116 of the Revenue Act of 1926. Inasmuch as the entire overpayment for 1924 was credited to taxes for prior years, no interest whatever was allowable under the statute on such overpayment. The Commissioner allowed no interest on the 1920 overpayment; however by an entry made by the collector the certificate of overassessment delivered to the plaintiff showed interest of $2,271.02 on that part of the 1924 overpayment credited against the

1918 additional assessment, $241.19 of which was applied by the collector in connection with various credits which he made. The balance of $1,929.83, which is sought to be here recovered, was neither credited nor refunded. The entry by the collector on the certificate of overassessment of the interest in question was clearly a mistake and was illegal and erroneous, and plaintiff is therefore not entitled to recover on this item.

The last item relates to adjustment of invested capital for 1920 on account of income and profits taxes for 1918 and 1919. In determining invested capital for 1920, the Commissioner reduced earned surplus by $447,623.09 representing the amount of the jeopardy assessment made in 1925 for 1918. He likewise reduced 1920 invested capital by an amount of tax determined for 1919, which was subsequently reduced without any change being made in 1920 invested capital on account of such reduction. In his final determination for 1920, the Commissioner erroneously reduced plaintiff's earned surplus in the amount of $108,359.83 on account of the 1918 and 1919 taxes. The correction of this error produces an overpayment for 1920 of $4,356.76 in excess of the overpayment determined and allowed by the Commissioner. This amount plaintiff is entitled to recover with interest in case M–155, and judgment in its favor will accordingly be entered.

Plaintiff is not entitled to recover in case No. 42394 relating to 1918 and the petition is dismissed. In case M–155 plaintiff is entitled to recover $4,356.76 with interest on $887.30 from August 10, 1921, and on $3,469.46 from April 8, 1921, to such date as the Commissioner may determine in accordance with section 177 (b) of the Judicial Code as amended by the Revenue Act of 1928, and judgment will accordingly be entered. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* and BOOTH, *Chief Justice*, concur.

GREEN, *Judge*, did not hear this case and took no part in its decision.

Reporter's Statement of the Case

# BUILDERS' CLUB OF CHICAGO v. THE UNITED STATES

[No. 42409. Decided June 1, 1936]

*On the Proofs*

*Excise tax; social, athletic or sporting club; right of suit by club for refund of tax; validity of Treasury Regulation to contrary.*—A social, athletic or sporting club required by law to collect and return the taxes to be paid by its members on their dues and initiation fees in the club has a right to refund of erroneous and illegal collections from it for such taxes, notwithstanding a Treasury Regulation providing for such refund to the club only upon power of attorney from the members, such regulation not being within either the language or the intent of the statute, and therefore invalid.

*Statutory construction.*—A construction of a statute which produces a consequence opposed to the spirit of the legislation is to be avoided if possible.

*The Reporter's* statement of the case:

*Mr. John E. Hughes* for the plaintiff.

*Mr. J. W. Blalock* for the defendant. *Mr. Sewall Key* was on the brief.

The court made special findings of fact as follows:

1. The Commissioner of Internal Revenue held that plaintiff was a social club and that its membership dues were subject to tax. Accordingly, plaintiff was required to collect the dues tax from its members, make monthly returns, and pay the tax to the collector at Chicago. After having made such returns and paid the tax, plaintiff filed a claim for refund of $9,196.55, being the amount of tax returned and paid for the period June 1925 to July 1929, inclusive, which was rejected.

2. Plaintiff brought suit in this court and based the suit on the ground that it was not a social club within the meaning of the statute, that its membership dues were not taxable, that the tax which it had returned and paid had been erroneously and illegally collected, and that it was entitled to judgment for the total amount collected. This court held that plaintiff was not a social club, that its

membership dues were not subject to tax, that the tax collected was erroneous and illegal, and rendered judgment for the amount of the claim with the exception of twenty-five dollars paid in July 1925 which was barred by the statute of limitation. The decision of this court was rendered May 2, 1932, and judgment was entered the same date. The taxes collected during the period July 1925 to July 1929, for which the court entered judgment, were refunded to plaintiff, but the amount of $1,318.55 of the tax collected from the plaintiff monthly for the period August 28, 1929, to March 25, 1932, for which plaintiff duly filed a claim for refund, was not refunded by the Commissioner on the ground that plaintiff had not filed with him powers of attorney from members of the club who had paid to plaintiff their dues in the club for the period mentioned authorizing the club to claim the refund of the taxes returned and paid by the club. Plaintiff's refund claim was rejected for the amount above stated November 11, 1932, and this suit was timely instituted.

**3.** The tax involved was collected on initiation fees and membership dues in the plaintiff club under section 413 of the Revenue Act of 1928, which section was in all material respects the same as sections 701 and 702 of the Revenue Act approved October 3, 1917, by which a tax of this character was first imposed.

Plaintiff was not taxable as a social, athletic, or sporting club or organization within the meaning of section 413 of the Revenue Act of 1928.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The defendant admits that plaintiff was not a social, athletic, or sporting club and that its initiation fees and membership dues were not subject to tax and that the amount sued for was illegally and erroneously collected.

The Treasury Department refused to refund this portion of the tax collected for the period subsequent to the period involved before this court in the case of *Builders' Club of Chicago* v. *United States*, 74 C. Cls. 595, 58 Fed. (2d) 503, on the ground that plaintiff had not secured and filed with

the Commissioner, pursuant to Article 54, Regulation 43, first promulgated in 1932, "a power of attorney executed by such person in whose behalf a claim [for refund] is filed authorizing the organization to act as his agent." The only question presented therefore is whether the plaintiff was entitled to claim and secure a refund of the tax which it was required to collect from its members and to return and pay to the Government. This question necessarily involves the validity of Article 54 of Regulation 43 to the effect that only the members of the club can legally claim a refund of any tax paid unless such members give to the club a duly executed power of attorney authorizing the club which collected, returned, and paid the tax to act as their agent.

Plaintiff contends that it was the taxpayer within the meaning of the statutes imposing the tax on club dues and the proper person to file a claim for refund and bring suit for the recovery of any tax in respect of which the claim was rejected and that the regulation in question is invalid as an unauthorized exercise by the Commissioner of his authority to make all needful rules and regulations for the proper administration of the statute. We agree with the position taken by plaintiff. From the time the tax on club dues was first imposed in 1917 until this regulation was issued, the club which collected the tax on its initiation fees and dues from its members, whom the statute provided should pay such tax to the club, has always been regarded as the taxpayer entitled to claim and secure the refund of any dues tax erroneously and illegally collected. The Treasury Department practice and the regulations consistently so recognized the club as the proper person to claim and receive the refund, and the decisions of this and other courts held that the club was the taxpayer who pays the tax to the Government and the one entitled to claim or recover a tax illegally or erroneously paid or collected, and that such club is not merely a collecting agent for the United States. *Alliance Country Club* v. *United States*, 62 C. Cls. 579; *United States* v. *Johnston*, 268 U. S. 220. In the first case mentioned this court said:

> the Treasury Department recognizes and treats the club as the taxpayer, both as the proper party to pay the tax and also as entitled to recover the tax if the

> same has been illegally or erroneously paid. We are of the same opinion, and therefore think there is nothing in the contention of the Government that the plaintiff is not the proper party to bring this action (p. 588).

In that case the Government relied upon and urged this court to follow the decision of the District Court for the Western District of Pennsylvania, in *Shannopin Country Club* v. *Heiner*, 2 Fed. (2d) 393, in which that court held that the club acted merely as a collecting agent for the Government and had no right of action for recovery of any dues tax illegally collected. But this court refused to follow that decision and, so far as we have been able to find, the decision in the *Shannopin case* is the only decision that has ever so held. In any event it is not consistent with *United States* v. *Johnston*, *supra*, in which the court subsequently held that the club was a debtor to the Government for the tax imposed on its initiation fees and dues and was not a collecting agent or bailee for the Government. If the club, which is required by the statute to return and pay the tax to the collector and which is liable for any interest or penalties for failure so to do, is the taxpayer within the meaning of the statute for the purpose of bringing suit and recovering any tax illegally or erroneously collected and receiving payment of any judgment in its favor, as we think is clearly true, it must be treated as the taxpayer entitled to claim and receive a refund through the Treasury Department of any such tax illegally collected and paid. A departmental regulation which treats the club merely as an agent of its members and requires that the individual club members each file claim for refund for the taxes paid by the club or give to the club duly executed powers of attorney to act as their agent is obviously legislation in the guise of a regulation and therefore invalid. The regulation in question, we think, attempts to engraft upon the taxing act a provision that is neither within the language nor intent of the statute. When Congress has deemed it advisable to legislate upon the subject of refunding taxes where the burden of the tax was not actually borne by the person returning and paying the same, it has spoken in terms sufficiently clear not to be misunderstood. See section 621 (d) of the Revenue Act of 1932 relating to certain excise taxes and the statutory provision relating to

the refund of motor accessory taxes involved in *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U. S. 386. The regulation in question is not consistent with the long-continued practice of the Treasury Department and has not received legislative approval. The provisions of section 607 of the Revenue Act of 1934, instead of being an approval of the decision of the Treasury Department that in returning and paying the tax the club is merely the agent of its members, recognize that the club is the one entitled to deal with the Government in respect of such taxes and makes the club subject to all summary and administrative provisions of the statutes relating to the assessment and collection of taxes by distraint. See Senate Finance Committee Report #558, page 53, on the Revenue Act of 1934.

A tax illegally collected from one who is required to return and pay the same does not belong to the Government. The Treasury Department may not retain it in the absence of legislative authority merely because it may believe that if the amount collected is refunded to the person who returned and paid it, some portion of the amount may not reach the hands of the persons who bore the burden of the tax. If the Bureau could thus refuse to refund taxes illegally collected the Treasury Department by a regulation could retain a great many taxes other than the tax on club dues which had been, admittedly, illegally collected, merely because the taxpayer had not shown that it had originally borne the burden of the tax. The regulation involved in this case is based solely on that ground. A construction of a statute which produces a consequence opposed to the spirit of the legislation is to be avoided if possible. The language of the act is to be read in the light of its policy. The only authority conferred by the revenue acts upon the Commissioner is to make regulations to carry out the purposes of the act, not to amend it. *Iselin* v. *United States*, 270 U. S. 245, 251; *Morrill* v. *Jones*, 106 U. S. 466; *Miller* v. *United States*, 294 U. S. 435; *American Safety Razor Corp.* v. *United States*, 79 C. Cls. 792; *Fresno Grape Products Corp.* v. *United States*, 81 C. Cls. 553, 11 Fed. Supp. 55.

Syllabus

Plaintiff is entitled to recover the amount of $1,318.55 claimed, with interest as provided by law, and judgment will be entered accordingly. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## BURDINE C. ANDERSON, JAMES E. ANDERSON, FRANK C. ANDERSON, WILLIAM LELAND ANDERSON, ROBERT S. ANDERSON, AND MONROE D. ANDERSON, AS TRUSTEES FOR THOMAS D. ANDERSON, AND MONROE D. ANDERSON, AS TRUSTEE FOR BENJAMIN M. ANDERSON, v. THE UNITED STATES

[No. 42472. Decided June 1, 1936]

*On the Proofs*

*Income tax; proof of waiver.*—Where a waiver of the time limitation for assessment of income tax for the year 1917 could not be produced, action and correspondence by and between the Commissioner of Internal Revenue and the taxpayer indicating and presupposing such waiver, together with the presumption of regularity of the Commissioner's action in the premises, held sufficient proof of its execution, and of its extending to April 1, 1924.

*Validity of waiver executed by executor.*—Under the Federal taxing acts an estate is a distinct taxable entity, and is placed in the same class as other taxpayers; and as the executor or administrator is the only person through whom the estate can act, he may waive the statute of limitation in respect of a tax due the Government in the same manner and to the same extent as any other taxpayer.

*Title and authority of executor or administrator.*—An executor or administrator takes no beneficial interest in the personalty, but takes it only for the purpose of administration and distribution, and as to any surplus after payment of debts, he is a mere trustee for those beneficially entitled to it. However, for the purpose of Federal taxation he does not stand in the shoes of his decedent, is more than a mere trustee, and is personally liable for the payment of the tax due from the decedent or his estate.

Reporter's Statement of the Case

*Validity of waiver executed after expiration of limitation on assessment; extension of limitation by section 277 (b) of Revenue Act of 1924.*—Waivers by the taxpayer or his executor were valid though executed after the expiration of a prior waiver, and under the provisions of section 277 (b) of the Revenue Act of 1924 the limitation on deficiency assessment was extended sixty days beyond the extension provided for by such waivers.

*Same; statute of limitation.*—A waiver of December 4, 1924, extending the period for assessment of 1917 income tax for a year from the expiration of a prior waiver on April 1, 1924, was valid; and under the provisions of section 277 (b) of the Revenue Act of 1924, extended the period for a deficiency assessment to June 1, 1925.

*Same; Commissioner's nonreliance on waiver.*—The fact that the Commissioner of Internal Revenue may not have relied upon a valid waiver, when assessing additional income tax, does not render the waiver ineffective.

*Statutory provisions for execution of waivers apply to all taxpayers.*—The statutory provisions for the execution of consents extending the limitation period for assessment of taxes were intended by Congress to apply alike to all taxpayers, whether they be individuals, corporations, associations, estates, or trusts.

*Recovery of tax where no valid assessment.*—Income tax due the Government from an estate and timely paid by the executor is not recoverable even if assessment was invalid, or was never made.

*Recovery of tax paid on assessment against deceased taxpayer.*—The assessment of income tax contemplated by the statute is an assessment of the *tax*, rather than of the *taxpayer;* and a correct tax paid by an executor on his decedent's income is not recoverable on the ground that its assessment was against the decedent, subsequent to his death, instead of against the estate or the executor.

*The Reporter's* statement of the case:

*Mr. R. C. Fulbright* and *Mr. Chase Morsey* for the plaintiffs. *Fulbright, Crooker & Freeman* were on the brief.

*Mr. John A. Rees*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

Plaintiffs sue to recover $36,843.54 with interest, additional income tax in respect of the income of Frank E. Anderson for 1917. Anderson died December 15, 1924, and it is alleged that this additional tax was barred when it was collected April 13, 1925.

The grounds on which the tax is sought to be recovered are (1) that the assessment was made against Frank E. Anderson after his death instead of against M. D. Anderson as executor of the estate and was, therefore, illegal and invalid and (2) that a waiver executed by the decedent on December 4, 1924, prior to his death, did not extend the statute of limitation because the period which the waiver purported to cover had already expired on April 1, 1923, and that a subsequent waiver for 1917 executed by the executor of the estate of Anderson on February 26, 1925, was illegal and invalid because the executor had no authority to waive the bar of the statute of limitation after the statutory period of limitation had expired.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Frank E. Anderson was a citizen and resident of Oklahoma City, Oklahoma, from 1900 until his death December 15, 1924. He died testate and M. D. Anderson of Houston, Texas, was duly appointed and qualified as executor of his estate. On or shortly after his appointment as executor, M. D. Anderson filed with the collector a "Preliminary Notice—Estate of Resident" as required by section 304 (a) of the Revenue Act of 1924, which gave notice to the collector of the death of Frank E. Anderson, the appointment of M. D. Anderson as executor, and the estimated value of decedent's property for estate tax purposes. This notice was received by the collector January 23, 1925.

2. The estate of Frank E. Anderson was finally closed April 16, 1934, and distribution was made on that date in accordance with the terms of the will to the decedent's wife, Burdine C. Anderson, and their six sons, all of whom are substituted plaintiffs in this action.

3. April 1, 1918, Frank E. Anderson filed his income tax return for 1917 showing a total net income from all sources of $197,269.10. That amount included $173,593.16 as his share of the profits of Anderson, Clayton & Company, a partnership, of Houston, Texas, and Oklahoma City, Oklahoma, for the period January 1 to August 15, 1917. The return showed a tax liability of $10,443.13, which was paid June 1, 1918. An additional tax of $3,554.02 for 1917 was

assessed in September 1919 and was paid October 20, 1919. Neither of the foregoing amounts is in controversy in this suit.

4. The partnership of Anderson, Clayton & Company, of which Frank E. Anderson was a member, kept its books and filed its tax return upon the basis of a fiscal year ending August 15, 1917. It filed an application for a determination of its excess profits tax liability for the taxable year 1917 under the provisions of section 210 of the Revenue Act of 1917. As a result of that application and for other reasons its income distributable to the members of the partnership and its tax liability for 1917 were not determined until 1926.

5. April 20, 1922, Frank E. Anderson executed a formal power of attorney appointing R. C. Fulbright, of Houston, Texas, his attorney in fact to represent him before the U. S. Treasury Department in all matters relating to Federal internal revenue taxes.

May 5, 1924, the Commissioner of Internal Revenue forwarded to Frank E. Anderson a thirty-day deficiency notice proposing an additional tax of $101,110.93 for 1917, such letter stating that "In accordance with the provisions of section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and to show cause or reason why this tax or deficiency should not be paid." Attached to this letter was a statement addressed to F. E. Anderson, also dated May 5, 1924, and signed on behalf of the Commissioner by J. G. Bright, Deputy Commissioner, which set forth the changes made by the Commissioner which resulted in the additional tax proposed, and stated in part as follows:

> 1917 Additional Tax $101,110.93 (Waiver executed).
>
> The examining officer's report dated November 11, 1920, a copy of which was furnished you has been approved with the following exceptions: * * *
>
> The adjustment of these items results in a further tax of $101,110.93.
>
> In a letter from the above-named partnership under date of April 11, 1923, it is stated that a waiver had been signed consenting to the above assessment. * * *

May 16, 1924, Frank E. Anderson filed with the Commissioner a sworn protest against the additional assessment as proposed in the letters of May 5, 1924, as follows:

> The undersigned, F. E. Anderson, respectfully appeals from decisions set forth in your letters of May 5, 1924, above file reference, in one of which the claim of this taxpayer for abatement of individual income taxes for 1917 in the sum of $13,997.15 is rejected and in the other claim is made that there is an additional tax liability upon this taxpayer for said year aggregating $101,110.93. Your letter stated that appeal may be made within thirty days and this appeal is therefore made upon the following grounds:
>
> These taxes are for the year 1917 during which period the undersigned was a member of the firm of Anderson, Clayton and Company, a copartnership at Houston, Texas, and Oklahoma City, Oklahoma, and field audit review has been made of the books of said firm as well as the accounts of this taxpayer. The total distributive income of this taxpayer from the said firm of Anderson, Clayton and Company for the year ending July 31, 1917, as disclosed by the field audit review is substantially in accordance with the statement contained in your letter but this taxpayer is unable to ascertain how you arrive at the conclusion that there is an additional tax of the amount above claimed as the figures stated in your communication do not agree with the field reviewer's report and explanation of the differences is not contained in your statement. The undersigned is therefore unable to set forth in detail the findings to which exception is taken, and as this additional claim is bound up in the same reports as the claim for abatement, it is respectfully requested that conference be granted in order that the matters may be considered together. The appeal from the action as to the claim for abatement is based upon the same grounds as heretofore stated.
>
> In further support of this appeal this taxpayer respectfully suggests that no final determination has been made of the income of said firm of Anderson, Clayton and Company for the taxable year 1917, or for the taxable year 1918, and that the taxable income of the undersigned will depend somewhat upon the findings reached in such case. A request has been made that the cases of the firm of Anderson, Clayton and Company, its subsidiaries and the individuals having

partnership interest therein be set down for consideration together for the fiscal years 1917 to 1920, being the period covered by the field audit review, in order that conferences may be held and correct tax liability determined. It is therefore respectfully urged that the case of this taxpayer for 1917 be held open for consideration in connection with the other cases and conference is respectfully requested. Pending further conferences request is respectfully made that the undersigned be furnished with explanation as to how the pro rata share of the excess profits tax liability of the undersigned in said partnership has been determined to be $92,692.09 and also, what, if any, changes have been made in the field reviewer's report in arriving at the total amount claimed.

This appeal is not taken for the purpose of delay nor to hinder the collection of the proper amount of tax.

November 22, 1924, the Commissioner replied to the protest and appeal of May 16, 1924, inclosing a formal waiver for 1917 and 1918. In this letter the taxpayer was advised as follows:

Reference is made to your appeal with regard to the determination of your tax liability as set forth in office letter of May 5, 1924, for the calendar year 1917, such appeal being based upon the fact that Anderson, Clayton and Company, a partnership of Houston, Texas, of which you are a member, had filed an application for assessment of its profits taxes under section 210 of the Revenue Act of 1917 for the fiscal years ended July 31, 1917, and July 31, 1918.

You are advised that your appeal will be [given] careful consideration and you will be advised of all further action taken in the matter.

However, the limitation of time within which to assess any individual additional tax which may be found to be due precludes careful consideration of all the facts in the case. It is, therefore, requested that you execute and return to this office within 20 days from the date of this letter, the enclosed forms of waiver for the years 1917 and 1918 by which you will note that you agree to an extension of time for one year beyond the statutory period of limitation as extended by any waivers already on file with the Bureau within which additional tax may be assessed, if any is found to be due for the years mentioned.

Frank E. Anderson replied by letter dated December 4, 1924, as follows:

> Your letter of the 22nd ultimo. I have signed these waivers and have sent them to our attorney, Mr. R. C. Fulbright, Houston, Texas, who will return them to you.

**6.** December 4, 1924, Frank E. Anderson signed the assessment and collection waiver for 1917, which reads in part as follows:

> * * * This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitation as extended by section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

This waiver was subsequently filed with and approved by the Commissioner.

February 26, 1925, a second waiver purporting to extend the statutory period for assessment against Frank E. Anderson for 1917 was signed "Frank E. Anderson (Deceased) by Monroe D. Anderson, Executor", and reads in part as follows:

> * * * This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

This waiver was subsequently filed with and approved by the Commissioner March 18, 1925.

On March 18, 1925, the Commissioner forwarded a letter to "Mr. Frank E. Anderson, 1300 Classon Blvd., Oklahoma [City], Oklahoma", which stated: "In accordance with the provisions of Section 274 (d) of the Revenue Act of 1924,

there has been assessed against you an income and excess profits tax amounting to $100,443.08 for the taxable year 1917 * * *." The letter further stated:

> The above deficiency in tax is a tentative determination inasmuch as the correct excess profits tax of the partnership firm, Anderson, Clayton and Company of Houston, Texas, for the fiscal year ended July 31, 1917, has not been finally determined.
>
> The immediate assessment of this deficiency is necessary in view of the fact that the new form waiver recently filed is signed by Monroe D. Anderson as executor for Frank E. Anderson and does not extend the period within which an assessment may be made beyond April 1, 1925.

The date "April 1, 1925" mentioned in this letter was the expiration date determined by the Commissioner for the waiver executed by decedent December 4, 1924.

7. March 21, 1925, R. C. Fulbright, acting under appropriate power of attorney, telegraphed the Commissioner as follows:

> Just received yours eighteenth with section two seventy four D assessment against Frank E. Anderson for nineteen seventeen with statement that the same is only tentative determination as partnership taxes of Anderson Clayton and Co. have not been finally determined. Have no objection to assessment being made now but respectfully urge that demand be stayed for present as Anderson estate will have to proceed further with liquidation agreements before payment can be made and also because there are large refunds for eighteen and nineteen. We do not want government to lose any legal rights but simply desire that you so handle matter as not to embarrass estate at this time. Estate is worth several million dollars and will be amply able to take care of claims in due course.

The Commissioner replied to the foregoing telegram on March 23, 1925, as follows:

> Collector will accept abatement claim nineteen seventeen tax assessed Frank E. Anderson under Section two seventy four D.

8. March 24, 1925, the Commissioner signed an assessment list on which there was listed an assessment of $100,443.08, personal income tax, and on the supplementary page at-

tached to this assessment list the amount so assessed was listed as an additional tax for 1917 in respect of the income of "Anderson, Frank E., 1300 Classon Blvd., Oklahoma City, Okla." On this supplementary page of the Commissioner's assessment list, in the column headed "Remarks", the Commissioner wrote the word "Waiver." The Commissioner's assessment list and the supplementary page above referred to are in evidence as Exhibit J to the stipulation of facts and are made a part of this finding by reference. March 30, 1925, the collector mailed a notice and demand for the payment of the foregoing assessment of $100,443.08, which notice and demand was addressed to "Frank E. Anderson, 1300 Classon Blvd., Oklahoma City, Okla." This notice and demand was duly received by M. D. Anderson, executor of the estate of Frank E. Anderson, deceased; no objection was made to the form or substance thereof, and the additional assessment of $100,443.08 was paid by the executor April 13, 1925.

**9.** November 21, 1925, after further examination and audit of Frank E. Anderson's return for 1917 the Commissioner forwarded a letter to "Mr. Frank E. Anderson, 1300 Classon Boulevard, Oklahoma City, Oklahoma", showing an overassessment of $14,416.41. A copy of that letter was mailed to R. C. Fulbright, Houston, Texas. This letter was received by the executor.

**10.** December 28, 1925, the Commissioner approved a schedule of overassessments which included an overassessment in favor of "Anderson, Frank E." for 1917 of $14,-416.41. That schedule, together with an original and copies of a certificate of overassessment for $14,416.41 for 1917, was forwarded to the collector for the District of Oklahoma for action in accordance with directions appearing thereon. The collector complied with those directions, and on January 18, 1926, signed and returned that schedule to the Commissioner together with a schedule of refunds and credits and the original and two copies of the certificate of overassessment. The schedule of refunds and credits and the certificate of overassessment showed the entire overassessment to be an overpayment, $12,603.52 of the overpayment being applied as a credit to an original assessment for 1924,

and the balance, $1,812.89, being refundable with interest of $585.26. The name "Anderson, Frank E." on the schedule of refunds and credits and the certificate of overassessment was changed to read "Monroe D. Anderson, Executor, Estate of Frank E. Anderson."

**11.** March 11, 1926, the Commissioner signed the schedule of refunds and credits. April 30, 1926, the collector mailed to Monroe D. Anderson, executor of the estate of Frank E. Anderson, the original certificate of overassessment for 1917, together with a Treasury check for $2,398.15 (amount refundable, $1,812.89; accrued interest, $585.26). The check was subsequently paid.

**12.** December 23, 1927, the Commissioner approved a schedule of overassessments which included an overassessment in favor of "Anderson, Estate of Frank E." in the amount of $49,183.11 for 1917. That schedule, together with an original and copies of the certificate of overassessment, was transmitted to the collector for the District of Oklahoma and handled in the same manner as the prior overassessment hereinbefore mentioned, except that no schedule of refunds and credits was prepared. The collector signed the schedule of overassessments December 31, 1927, and returned it, together with the original and two copies of the certificate of overassessment, to the Commissioner. The entire overassessment was found to be an overpayment and interest was computed thereon of $7,950.14, that is, a total amount to be paid of $57,133.25. The original certificate of overassessment, together with check dated March 29, 1928, for $57,133.25, was thereafter mailed by the collector to M. D. Anderson, executor of the estate of Frank E. Anderson, and the check was subsequently presented for payment and paid.

**13.** April 3, 1929, "M. D. Anderson, Executor of Estate of F. E. Anderson, Deceased", filed a claim for refund for 1917 of $86,026.67 and assigned the following basis therefor:

> **Limitation expired on the assessment of 1917 taxes on April 1, 1923, while the above tax was not assessed until March 1925. Both the assessment and collection of the tax in the amount of $100,443.08 were accordingly barred. Subsequently the Commissioner ap-**

proved as an allowance for credit or refund of 1917 taxes the amount of $14,416.41, leaving an overpayment of $86,026.67 for which this claim is filed. Waivers of the assessment and collection of 1917 taxes filed December 4, 1924, and February 26, 1925, were not valid since the assessment and collection was barred before they were signed and prior to the enactment of the Act of 1924.

A further claim for refund of $36,843.56 for 1917 was filed April 26, 1929, by "M. D. Anderson, Executor of the Estate of F. E. Anderson (Deceased)" which assigned the following basis therefor:

> Limitation expired on the assessment of 1917 taxes on April 1, 1923, while $100,443.08 was not assessed until March 1925. Both assessment and collection of the tax in the amount of $100,443.08 were accordingly barred. Subsequently the Commissioner approved as an allowance for credit or refund of 1917 taxes the amounts of $14,416.41 and $49,183.11, leaving an overpayment of $36,843.56 for which this claim is filed. Waivers of the assessment and collection of 1917 taxes filed December 4, 1924, and February 26, 1925, were not valid since the assessment and collection were barred before they were signed and prior to the enactment of the Act of 1924.

The Commissioner rejected these claims July 10, 1931.

The court decided that plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiffs contend that there were no valid waivers of the statute of limitation which extended the period to March 24, 1925, for assessment of additional income tax in respect of the income of Frank E. Anderson from 1917 and that even if there were such valid waivers the assessment made in this case was wholly invalid and of no force and effect; and as no assessment was made within any statutory period against the *estate* of Frank E. Anderson for 1917 the additional tax, which was barred when collected, should be refunded.

If the facts and circumstances are sufficient to show with reasonable certainty that the decedent executed a waiver

prior to the one executed on December 4, 1924, we must hold that such waiver was effective although it cannot now be located. The facts and circumstances indicate that a waiver for 1917 was executed prior to May 5, 1924, and there is no evidence to the contrary.

We are of opinion, first, that the record in this case justifies the conclusion that the limitation period for assessment of any tax due for 1917 as extended by waivers executed by Frank E. Anderson prior to his death had not expired when his executor executed a waiver for that year on February 26, 1925, and, second, that even if the period allowed for assessment of the tax had expired prior to the execution by the executor of a waiver in respect of the year 1917, such waiver was valid. In either event the assessment on March 24, 1925, pursuant to a 60-day deficiency notice mailed March 18, 1925, was timely. No waiver of the statute of limitation prior to the waiver executed by the decedent, Frank E. Anderson, on December 4, 1924, could be found in the papers of the decedent or in the files of the Bureau of Internal Revenue, but the correspondence and deficiency notices with reference to the additional tax in respect of the income of Frank E. Anderson for 1917 which passed between the Commissioner of Internal Revenue and Frank E. Anderson, during his lifetime, and his counsel show that they proceeded on the understanding that a waiver had been executed some time prior to May 5, 1924. In his letter of May 5, 1924, the Commissioner advised Frank E. Anderson of a deficiency of $101.110.93 for 1917 and, in the same letter, referred to the fact that a waiver for 1917 had been executed. In this deficiency letter the Commissioner advised Anderson that he would be given an opportunity to file an appeal from the proposed additional assessment. Such an appeal was filed by Frank E. Anderson on May 16, 1924, but in it he made no reference to the statute of limitation, nor did he contend that assessment of the proposed deficiency was barred although the statutory period of limitation for assessment of any additional tax for 1917 had expired on April 1, 1923, if the Commissioner was incorrect in stating in his letter of May 5, 1924, that a waiver for 1917 had been executed. The Commissioner in

Opinion of the Court

his letter of March 18, 1925 (finding 6), and the taxpayer's representative in the telegram of March 21, 1925, on behalf of the taxpayer seem to have regarded the assessment as timely (finding 7). These facts and circumstances and the presumption of regularity of the Commissioner's action require us to conclude that Frank E. Anderson had executed a waiver with respect to 1917 prior to May 5, 1924. Compare *Trustees for Ohio & Big Sandy Coal Co., et al.*, v. *Commissioner*, 9 B. T. A. 617, 625, 43 Fed. (2d) 782; *Eclipse Lawn Mower Co.* v. *United States*, 76 C. Cls. 354. Inasmuch as Frank E. Anderson died before this question arose and the first waiver for 1917 cannot be located, there is an absence of evidence as to the period for which this waiver extended the statutory period of five years after the return for 1917 was filed on April 1, 1918. However, we cannot ignore this waiver entirely merely because the effective period of the waiver cannot be positively established. From the great number of 1917 waivers which have been involved in cases before the court, we are justified under the facts and circumstances in this case in concluding that this first waiver for 1917 was effective either for a period of one year after April 1, 1923, or that it was an unlimited waiver (as was the case with most of the early 1917 waivers) and under the Commissioner's published ruling it was effective until April 1, 1924. In view of the foregoing, the waiver executed by the decedent on December 4, 1924, about which there is no controversy, extended the statute of limitation to June 1, 1925, under section 277 (b) of the Revenue Act of 1924. The waiver executed by Monroe D. Anderson, executor, on February 26, 1925, was therefore executed before the expiration of the statute of limitation as previously extended by the decedent. See *Aldridge* v. *United States*, 64 C. Cls. 424; *Colonial Trust Co.* v. *United States*, 73 C. Cls. 549; *Davis et al.* v. *United States*, 27 Fed. (2d) 630; *Dodge* v. *Commissioner*, 13 B. T. A. 201.

**If it be assumed however that the waiver of December 4, 1924, was the only waiver executed by the decedent, Frank E. Anderson, and that this waiver operated to extend the statute of limitation of five years only to June 1, 1924, under section 277 (b) of the Revenue Act of 1924, and that such**

limitation period, as so extended, had expired on February 26, 1925, when the executor executed the waiver for 1917, we are nevertheless of the opinion that such waiver by the executor was valid and that the assessment of the tax in controversy on March 24, 1925, was timely.

Plaintiffs contend that an executor or administrator is without legal authority to waive a statute of limitation after it has expired or to pay a debt barred by limitation, but we cannot agree that this is true with respect to Federal taxes. The decisions of state courts with reference to the right of an executor or administrator to waive the statute of limitation or pay a debt that is barred are conflicting. The courts in some states hold that he may do so while others hold that he cannot. See sections 906 to 912, 24 Corpus Juris 296, 299; 1 Williston on Contracts, section 194. Certain states have statutes to the effect that an executor may not waive the bar of the statute after it has fallen; there was no such statute in Oklahoma, of which state the decedent was a resident, but the state of Texas, of which Monroe D. Anderson, the executor, was a resident and citizen, and where the estate of Frank E. Anderson was administered, did have such a statute. The decisions of the courts of certain states and the statutes mentioned to the effect that an executor or administrator must plead the statute of limitation and may not waive the bar of the statute after it has fallen, extend only to the authority of such executor or administrator as a trustee of the property and funds of an estate for the benefit of creditors, heirs, and beneficiaries, and are based on the principle that it is not competent for contracting parties to impose liabilities on others without their consent; that the executor or administrator, as the representative, is not empowered to make anew or enlarge the contract of the decedent, to ratify void transactions, or to waive defenses to which he is entitled by law, and that the estate, as such, is not an entity which may contract or agree with others with respect to the interests of creditors or beneficiaries. It is generally held that those who have an interest in the property and funds of the estate may waive the statute even after the bar has fallen. An executor who is also a beneficiary may do so. *United States* v. *Heinrich*,

70 Fed. (2d) 726. But the state rule is based on the law of contracts, the absence of a statutory provision that the statute of limitation may be waived by a written consent, and the fact that the property and funds of the decedent's estate do not belong either to the estate as a distinct entity capable of contracting or to the executor or administrator. In some jurisdictions the title to personal as well as real property vests in the heirs or beneficiaries under the will, subject to a lien of the executor or administrator for the payment of debts and to his right of possession. However, the representative, as such, takes no beneficial interest in the personalty, but takes it only for the purpose of administration and distribution, and as to any surplus remaining after the payment of debts he is a mere trustee for those beneficially entitled. For the purpose of Federal taxation, however, the executor or administrator does not stand in the shoes of the decedent, and he is more than a mere trustee. *Hartley, Executor*, v. *Commissioner*, 295 U. S. 216, 218. He is personally liable for the payment of the tax due by the decedent or the estate, R. S. 3467. The provisions of the taxing act are directed to the estate and the executor thereof, and the authority of the executor in such matters is not dependent upon the consent of the beneficiaries. His authority in respect of taxes for which the estate is liable is, so far as concerns a waiver, equal to that of any taxpayer. The provisions of the Federal taxing statutes which make the estate of a deceased person a separate and distinct entity for tax purposes and provisions authorizing the execution of consents waiving the statute of limitation render the decisions of state courts, that an executor may not waive a limitation statute or pay a barred debt, and the state statutes, that he may not do so, inapplicable so far as concerns the authority of the estate and the executor with respect to Federal taxes. Under the Federal taxing acts an estate is a distinct taxable entity and is placed in the same class as other taxpayers, *Hartley, Executor*, v. *Commissioner*, *supra*, and, as the executor or administrator is the only person through whom the estate can act, we are of opinion that an executor or administrator acting for the estate may waive the statute of limitation in respect of a tax due the Govern-

ment in the same manner and to the same extent as any other taxpayer. See *Stange* v. *United States*, 68 C. Cls. 395. We think also that the statutory provision for the execution of consents extending the limitation period was intended by Congress to apply alike to all taxpayers, whether they be individuals, corporations, associations, estates, or trusts. In *Burnet* v. *Harmel*, 287 U. S. 103, 110, which involved the effect of state laws upon Federal taxing statutes, the court said:

> Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. See *Weiss* v. *Weiner*, 279 U. S. 333, 337; *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110; *United States* v. *Childs*, 266 U. S. 304, 309. State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. See *Crooks* v. *Harrelson*, 282 U. S. 55; *Poe* v. *Seaborn*, 282 U. S. 101; *United States* v. *Loan & Building Co.*, 278 U. S. 55; *Tyler* v. *United States*, 281 U. S. 497; see *Von Baumbach* v. *Sargent Land Co.*, *supra*, 519.
>
> But section 208 neither says nor implies that the determination of "gain from the sale or exchange of capital assets" is to be controlled by state law. For the purpose of applying this section to the particular payments now under consideration, the Act of Congress has its own criteria, irrespective of any particular characterization of the payments in the local law. See *Weiss* v. *Weiner*, *supra*, 337. The state law creates legal interests but the federal statute determines when and how they shall be taxed. We examine the Texas law only for the purpose of ascertaining whether the leases conform to the standard which the taxing statute prescribes for giving the favored treatment to capital gains. Thus tested we find in the Texas leases no differences from those leases where the title to the oil and gas passes only on severance by the lessee, which are of sufficient consequence to call for any different applica-

> tion of section 208. The fact that title to the oil and gas is said to pass before severance, rather than after, is not such a difference.

See *Berg* v. *Commissioner*, 6 B. T. A. 1287, 33 Fed. (2d) 641.

The waiver of February 26, 1925, was duly executed by the executor of the estate of Frank E. Anderson and was duly approved in writing by the Commissioner. The fact that the Commissioner may not have relied upon the waiver at the time he made the assessment did not render it ineffective. *Vanderlip* v. *United States*, 79 C. Cls. 489, 6 F. Supp. 965, 969.

We cannot concur in the second contention made by plaintiffs that the additional income tax of $100,443.08 in respect of the income of Frank E. Anderson for 1917 paid April 13, 1925, by his estate by M. D. Anderson, executor, is recoverable on the ground that no legal assessment thereof has ever been made and that it is barred. In support of this contention plaintiffs insist that the Commissioner's assessment was against Frank E. Anderson and that inasmuch as Anderson died prior to the date on which the Commissioner assessed the tax, such assessment was illegal and void and as no legal assessment has ever been made the statute of limitation has expired and the amount collected should be refunded. Under the waivers discussed above the time within which the Commissioner could assess the additional tax for 1917 was extended to December 31, 1925, and if it be assumed that the assessment on March 24, 1925, was not valid (with which we do not agree) the collection of the tax on Arpil 13, 1925, was nevertheless timely and the amount so collected could not be recovered even if no assessment had been made. *Meyersdale Fuel Co.* v. *United States*, 70 C. Cls. 765, 783; *Muir* v. *United States*, 78 C. Cls. 150; *Mahoning Investment Co.* v. *United States*, 78 C. Cls. 231; *Crompton & Knowles Loom Works* v. *White*, 65 Fed. (2d) 132. Moreover, we are of opinion that the assessment involved in this case was not illegal or void. The contention of the plaintiffs is in effect that the Commissioner of Internal Revenue assesses *the taxpayer* instead of assessing

*the tax.* The assessment contemplated by and referred to in the statute is the assessment by the Commissioner of the tax and the Commissioner's assessment list, which the Commissioner actually signs when he makes an assessment of the tax, does not contain the names of any taxpayers but contains only the amounts and the total tax as "additional assessments made by the Commissioner." The certificate appearing on this assessment list of the Commissioner is as follows:

> I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Attached to this assessment list of the Commissioner are separate sheets for use by the collector in keeping his record of collections, credits, and balances due on which is written the name of the person or corporation in respect of whose taxes the amount stated on the Commissioner's assessment list has been assessed. These supplementary pages for use of the collector in keeping his records and in collecting the amounts assessed are never signed by the Commissioner. It is clear, therefore, that if the amount of tax assessed by the Commissioner is correct, as was true in this case, and if the person liable for the payment of the tax pays the same to the collector, as was done by the estate of Frank E. Anderson, no recovery of the amount so assessed and paid can be had merely because the Commissioner did not enter the name of the estate or the executor in full on the supplementary sheet attached to the Commissioner's assessment list on which the tax was assessed.

Plaintiffs are not entitled to recover and the petition must be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

## JOHN AMICON v. THE UNITED STATES

[No. 42482. Decided June 1, 1936]

### *On the Proofs*

*Income tax; deficiency assessment; validity where sixty-day deficiency letter not sent taxpayer.*—Where the Commissioner of Internal Revenue notified the taxpayer that deficiencies in his taxes had been found and would be assessed against him, and the taxpayer consented to such assessment, their assessment and collection were not invalidated by failure of the Commissioner to send the usual 60-day letter notifying the taxpayer of the proposed assessment.

*Waiver of sixty-day letter and right of appeal.*—The statutory requirements in respect to sending the 60-day letter notifying a taxpayer of proposed deficiencies, and his right of appeal to the Board of Tax Appeals, could be waived by the taxpayer; and his written consent to the assessment of such deficiencies amounted to a waiver of such letter and his right to appeal to the Board.

*Statutes of limitation; bond guaranteeing payment; new cause of action; interest.*—The giving of bond by the taxpayer in order to secure delay in payment of the tax created a separate and distinct cause of action from that which the Government already had for its collection, the making of the bond being in effect a substitution of independent liability under the bond for the tax liability, both principal and interest, guaranteed by the bond; and the statutory limitation on assessment and collection of taxes does not apply, even though collection was made without the necessity of proceeding against the bond.

*The Reporter's* statement of the case:

*Mr. Francis R. Lash* for the plaintiff. *Mr. Raymond A. Lash* was on the brief.

*Mr. J. H. Sheppard*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

The plaintiff, John Amicon, is now, and, at all times hereinafter mentioned, was a member of a partnership trading and doing business under the name of John Amicon Bro. & Company, hereinafter referred to as the partnership, owning fifty per cent interest therein. Said partnership was

engaged in the wholesale fruit and produce business, having its principal office and place of business at Columbus in the State of Ohio.

On March 15, 1921, the plaintiff filed with the then Collector of Internal Revenue for the 11th District of Ohio his individual income-tax return on Form 1040 for the calendar year ended December 31, 1920, showing a tax due thereon of $1,385.61, which amount was paid in quarterly installments during the year 1921.

On March 15, 1922, plaintiff filed with the Collector of Internal Revenue his individual income-tax return on Form 1040 for the calendar year ended December 31, 1921, showing a tax due thereon of $1,101.90, which amount was paid in installments during the calendar year 1922.

Thereafter, the Commissioner of Internal Revenue caused to be made an examination of the books of account and records of the plaintiff and the partnership in connection with the audit of the plaintiff's returns for the years 1920 and 1921. By letter dated August 12, 1925, the plaintiff was advised of the result of this examination. Plaintiff thereupon protested the determination, and as a result thereof a supplemental examination was made, of which plaintiff was duly advised.

December 4, 1925, the Commissioner was notified by a letter written in behalf of the plaintiff that he consented to the assessment of a deficiency in tax aggregating $13,693.28 resulting from the report of the revenue agent set out in the preceding paragraph. On January 18, 1926, plaintiff was advised by the Commissioner that the supplemental report had been approved and that the determination showed a deficiency of $4,497.12 for 1920 and $9,196.16 for 1921 and that an aggregate deficiency of $13,693.28 would be immediately entered for assessment. These assessments having been entered on the February 1926 list and approved March 6, 1926, a notice and demand for payment thereof was made by the collector March 22, 1926, and the plaintiff on May 15, 1926, filed an "Application for extension of time for the payment of a deficiency in tax under section 274 (k) of the Revenue Act of 1926." June 4, 1926, the collector received a letter on behalf of the plain-

tiff asking the privilege of making divided payments on the amount assessed during the next four months ensuing.

On July 6, 1926, the Commissioner advised the collector that said application would be approved on the filing of a surety bond by the plaintiff guaranteeing the payment of $15,681.82 on or before September 10, 1926, plus interest at the rate of 0.5 per cent a month from March 22, 1926. About August 17, 1926, the plaintiff filed a bond accordingly in the sum of $16,000, conditioned upon the payment of the "deficiency in tax found to be due by the Commissioner, plus penalty and interest, in accordance with the terms of the extension granted."

Payments were thereafter made as follows:

| Date paid | Additional tax | Interest | Additional interest |
|---|---|---|---|
| 1920 | | | |
| Sept. 29, 1926 | $4,497.12 | | |
| Oct. 25, 1926 | | $5.85 | $159.14 |
| Total | 4,497.12 | 5.85 | 159.14 |
| 1921 | | | |
| Sept. 21, 1926 | 5,000.00 | | |
| Sept. 29, 1926 | 502.88 | | |
| Oct. 8, 1926 | 2,500.00 | | |
| Oct. 25, 1926 | 1,193.28 | 1,982.69 | 385.24 |
| Total | 9,196.16 | 1,982.69 | 385.24 |

The foregoing amounts of interest, to wit, $5.85, $159.14, $1,982.69, and $385.24, totaling $2,532.92, which were paid on October 25, 1926, were assessed by the Commissioner of Internal Revenue on the collector's October–530140–1926 list, and approved by the Commissioner of Internal Revenue November 24, 1926.

On September 27, 1930, plaintiff filed a claim for refund, in the amount of $4,497.12 for the year 1920 and a claim in the amount of $9,196.16 for the year 1921. On July 24, 1931, the plaintiff was advised that the claims for refund were disallowed and that the disallowance appeared on a schedule dated July 24, 1931.

No contention is made that the claims for refund were not in proper form.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff seeks to recover the amount of certain deficiency assessments of income tax assessed against him for the years 1920 and 1921 together with certain items of interest that were also assessed against him on these deficiencies for the same years. His action is based upon the fact that no "sixty-day letter" was sent to him notifying him of the proposed assessment and his right to take an appeal to the Board of Tax Appeals and also that the taxes in controversy were collected after the expiration of the applicable statutory period of limitation.

We are clear that the suit is without merit. While no "sixty-day letter" was sent, the plaintiff was notified that after audit of his books a deficiency had been found and would be entered for assessment. On March 6, 1926, the Commissioner approved the February 1926 certificate and assessment list of the deficiencies in controversy for the years 1920 and 1921, and, upon notice and demand made March 22, 1926, by the collector to pay these deficiencies, the plaintiff filed an application for extension of time for the payment thereof. This application was granted by the Commissioner on condition that the plaintiff would file a bond guaranteeing payment of the deficiencies. Accordingly, on August 17, 1926, plaintiff filed a bond in the sum of $16,000 for the payment of these deficiencies, and in the latter part of 1926 paid the additional tax with interest which had also been assessed thereon.

It is not contended that the taxes in controversy were not assessed within the statutory period as provided by the 1926 act, and the plaintiff is in no position to object to their validity on the ground that he did not receive a sixty-day letter. The statutory requirements in respect to this matter could be waived and while the plaintiff filed no formal waiver he did file what amounted to a waiver of the sixty-day letter and his right to appeal to the Board when he filed his written consent to the assessment of the deficiency. Further, when the plaintiff was notified that the assessments had been entered in accordance with his consent and a notice and demand for payment thereof was made, he filed and obtained an extension of time and also the privilege of making divided payments on the amount

assessed. It will thus be seen that the plaintiff not only advised the Commissioner that he agreed to the assessment but further informed the Commissioner that he would pay it if given time, and he finally set a seal to this agreement by filing a bond for the payment of the tax.

In *Thomaston Cotton Mills* v. *Rose*, 62 Fed. (2d) 982, it was held that the failure of the Commissioner to send a sixty-day letter to the taxpayer was a mere irregularity of which the taxpayer could not complain after payment of the tax, and in *Atkinson* v. *United States*, 4 Fed Supp. 398, it was held that where the taxpayer was notified in writing of the deficiency assessment and the application of an overassessment for another year thereon, but took no steps to perfect any appeal to the Board of Tax Appeals, or to require the Commissioner to furnish the notice contemplated by the statute, and delayed until four years after to bring a suit on an implied contract for a recovery of the deficiency, he had waived any defect in failing to give the sixty-day notice, and also that by consenting to the assessment had made a further waiver. The instant case is even stronger against the plaintiff than the one cited.

There is another matter which is fatal to plaintiff's right of recovery in this case. He filed a bond for the payment of the taxes in controversy and afterwards made payment as required by the bond. In many cases it has been held that where a bond has been executed in order to obtain time to pay an assessed tax, the tax must be paid after the delay has been enjoyed. See *Maryland Casualty Co.* v. *United States*, 76 Fed. (2d) 626, and cases cited therein.

In *United States* v. *John Barth Co.*, 279 U. S. 370, it was held that—

> The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had.

In the instant case plaintiff paid the taxes assessed and therefore it was not necessary to proceed against the bond, but this does not alter the fact that the making of the payments was the condition of the bond. In *Bryant-Link Co.* v. *Hopkins*, 47 Fed. (2d) 1068, it was held that the fact that the plaintiff paid the tax on demand and thus rendered a suit on the bond unnecessary did not affect the question

of law decided in the *John Barth Co. case*, *supra*, where it was held in effect that the taxpayer substituted for his tax liability his contract under the bond.

It is also contended on behalf of plaintiff that even if he can not recover the taxes paid for 1920 and 1921 he is entitled to a refund of the interest paid thereon which was not assessed within the statutory period as a part of the tax and not collected within such period.

It has already been noted that in the *John Barth Co. case*, *supra*, it was held that the taxpayer substituted for his tax liability his contract under the bond; and in the *Bryant-Link Co. case*, *supra*, it was held (following the rule in the *John Barth Co. case*) that the bond constituted an independent valid promise to pay the tax found by the Commissioner to be due. In the instant case the condition of the bond was that the plaintiff should pay the tax found to be due by the Commissioner, plus penalty and interest. The interest being covered by the bond, the same rules would apply with reference to its collection as have already been laid down with reference to the collection of the deficiencies in the taxes.

It follows that plaintiff's petition must be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

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## WILLIAM D. JUDSON, TRUSTEE, ADRIENNE B. CHARLES TRUST v. THE UNITED STATES

[Nos. 42522, 42811. Decided June 1, 1936]

*On the Proofs*

*Income tax; profit on sale of part of corpus of trust fund; whether taxable to trustee or to beneficiary of trust.*—Profit on the sale by a trustee of stocks and bonds constituting part of a trust fund in his administration of the trust for a life beneficiary, when not paid nor required to be paid to the beneficiary, constituted an accretion to the corpus of the trust, rather than income from the corpus, and was therefore taxable as income to the trustee and not to the beneficiary.

Reporter's Statement of the Case

*Construction of trust provisions; intention of parties.*—The intention of the parties to a trust must be given effect in determining whether income of the trust, including profit from sale of the corpus, was to be distributed currently or in the discretion of the trustee.

*Same; consideration to be given State laws.*—While State laws and decisions of State courts cannot restrict the operation of Federal taxing statutes, the law of the State where a trust is executed and administered is persuasive in determining whether a profit realized is income of a character which must be distributed to the beneficiary under the terms of the trust.

*Same; rule of law in New York.*—Under the decisions of the courts of the State of New York, profit on the sale of trust property is not distributable to the life beneficiary, but increases the corpus of the trust.

*The Reporter's* statement of the case:

*Mr. William J. Hughes, Jr.*, for the plaintiff. *Mr. Earle D. Norton* was on the brief.

*Mr. Joseph H. Sheppard*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

These two suits relate to the same amount of $4,225.06 with interest, income tax for 1928.

The first suit is based upon an alleged account stated and the second upon a rejected claim for refund filed by plaintiff which involves the merits of the question whether a certain profit from the sale of securities belonging to a trust, of which plaintiff was the trustee, was, under the terms of the trust, distributable to the beneficiary and therefore taxable to her instead of the trustee by whom the tax was returned and paid.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

**1. July 1, 1927, Adrienne B. Charles as "settlor" and** William David Judson as "trustee" executed a trust indenture pursuant to which the settlor transferred to the trustee various stocks and bonds which the trustee received and agreed to hold upon the following uses and trusts, among others:

> FIRST. The trustee shall invest and reinvest the same, shall receive and collect the income, dividends, and

profits thereon and, after paying all necessary and proper expenses and charges, shall transfer and pay over to the settlor during her life the net income and in the absolute and unrestricted discretion of the trustee without accountability to any person whatsoever, also so much of the principal of this trust fund as the trustee may determine even to the whole of said principal.

Upon the death of said Adrienne B. Charles, if the said William David Judson shall then be living, the trustee shall transfer, assign, and pay over the principal of the trust fund then in his hands to the said William David Judson absolutely and forever and free from any trust hereunder.

2. Adrienne B. Charles died June 4, 1930, leaving surviving her the aforementioned William David Judson, who was named as trustee and remainder beneficiary under the trust indenture referred to above.

3. During 1928 plaintiff, the trustee named in the above-mentioned trust indenture, sold various stocks and bonds which he then held subject to the terms and conditions of the trust, and realized a profit therefrom in the net amount of $44,470.94.

4. March 13, 1929, plaintiff filed a fiduciary return (form 1041) for 1928 which disclosed that he had received income and profits for the calendar year 1928 as follows: Dividends from stocks, $15.358.86, and net profits from the sale of trust securities, $44,470.94. The return also showed the amount received as dividends, $15,358.86, taxable to the life beneficiary of the trust, Adrienne B. Charles, and the net amount received from the sale of trust securities, $44,470.94, taxable to plaintiff, fiduciary of the trust.

On the same day plaintiff as trustee filed an individual income-tax return (form 1040) for the calendar year 1928 which showed a tax due of $4,225.06 based upon the income item of $44,470.94 referred to above. The tax of $4,225.06 was assessed March 14, 1929, and paid as follows:

| | |
|---|---|
| March 14, 1929 | $1, 225. 06 |
| June 13, 1929 | 1, 000. 00 |
| September 10, 1929 | 1, 000. 00 |
| December 13, 1929 | 1, 000. 00 |
| Total | 4, 225. 06 |

Likewise on March 13, 1929, Adrienne B. Charles filed her individual income-tax return for the calendar year 1928 which reported the dividend item set out in the fiduciary return of $15,358.86. The return showed a tax due of $40.49, which was paid when the return was filed. Subsequently an additional tax of $13.12 was duly assessed against her for the same year on account of an error in computation, and that amount was duly paid.

**5.** March 10, 1930, a revenue agent examined the returns for 1928 as filed by plaintiff and recommended an overassessment of $4,224.68 on the theory that the full amount of profit realized from the sale of trust securities was taxable to the life beneficiary, Adrienne B. Charles, and not to the fiduciary of the trust. March 31, 1930, notice of the revenue agent's recommendation was mailed to William D. Judson, trustee, care of Winthrop, Stimson, Putnam & Roberts, 32 Liberty Street, New York City.

March 31, 1930, the same revenue agent examined the individual return of Adrienne B. Charles for 1928 and recommended an additional tax of $6,100.62 on the theory consistent with that applied in connection with the examination of plaintiff's returns, namely, that the profit realized on the sale of the trust securities was taxable to her and not to the fiduciary.

**6.** May 9, 1930, plaintiff filed a protest against the recommendation of the revenue agent on the following basis:

> The revenue agent has erroneously and illegally eliminated from his [taxpayer's] taxable income for the year 1927 [8], as trustee aforesaid, the amount of $44,470.94, representing profits realized by him as Trustee through sales of securities.
>
> The agent has erroneously and illegally treated the said profits as belonging to and being taxable to the beneficiary of said deed of trust, Adrienne B. Charles, and has accordingly added the same to her taxable income, protest against which is being made by her contemporaneously herewith.

On the same day, May 9, 1930, Adrienne B. Charles filed a similar protest in part as follows:

> The agent has illegally and erroneously included in my taxable income all the profits realized by William D. Judson as trustee under a certain trust agreement

> made by me as grantor to the said William D. Judson as trustee, dated July 1, 1927 (a copy of which is hereto annexed), which said profits amounted to $44,470.94, all of which were legally taxable to said trustee as reported by him.

**7.** November 6, 1930, the Bureau of Internal Revenue addressed a communication to Adrienne B. Charles advising her of the approval of the recommendation of the revenue agent as to the deficiency in her tax for 1928 in the amount of $6,100.62 and on January 13, 1931, the Commissioner mailed a deficiency notice showing a determination to the same effect.

**8.** January 27, 1931, the Bureau of Internal Revenue mailed a letter to plaintiff suggesting that a claim for refund be filed for 1928 in the amount recommended by the revenue agent in order to protect his rights against the running of the statute of limitations. However, shortly prior thereto, namely, January 20, 1931, plaintiff had filed a claim for refund for 1928 with the collector in which the following basis was assigned therefor:

> The internal revenue agent in charge, 17 Battery Place, New York, N. Y., after an examination of the fiduciary return of income for the calendar year 1928 by a field auditor, determined that the full amount of the trust income of $59,853.92 is taxable against Miss Adrienne B. Charles since she is entitled to all the income of the trust, as set forth in the trust agreement.
>
> A review of the report of the internal revenue agent in charge was affirmed by J. C. Wilmer, Deputy Commissioner, Treasury Department, Washington, D. C., and assessment for entire income of the trust is made against Miss Adrienne B. Charles.

**9.** May 8, 1931, the Bureau of Internal Revenue sent a letter to plaintiff in which reference was made to the above determination of an overassessment in favor of plaintiff and an additional tax against Adrienne B. Charles on account of the same income. Advice was requested as to whether it would be satisfactory to have the overassessment in favor of plaintiff applied as a credit against the deficiency of Adrienne B. Charles.

May 28, 1931, plaintiff replied to the Bureau's letter of May 8, 1931, and requested that the overpayment be for-

warded to him as trustee, but made no direct statement as to the application referred to in the Bureau's letter. June 10, 1931, the Bureau again requested information as to whether it would be satisfactory to have the overassessment applied as a credit against the deficiency and on June 24, 1931, plaintiff again stated that whatever overpayment had been made on his return for 1928 should be forwarded to him as trustee.

**10.** April 2, 1932, the Commissioner signed a schedule of overassessments on which was listed an overassessment in favor of plaintiff in the amount of $4,225.06. A certificate of overassessment in the same amount was issued by the Commissioner to plaintiff on the same day. The certificate of overassessment showed that the entire overassessment of $4,225.06 in favor of plaintiff had been credited to the deficiency of $6,100.62 which had been assessed against Adrienne B. Charles. Subsequently the foregoing certificate of overassessment was canceled by the Commissioner.

**11.** September 21, 1932, the Commissioner, as a result of a protest made by plaintiff to the application of the overassessment in his favor as a credit against the deficiency of Adrienne B. Charles, reconsidered his determination for 1928 both with respect to plaintiff and Adrienne B. Charles and advised plaintiff's counsel on that date that his office had "concluded that the income and profits from this trust were reported on the correct basis in the first instance." The Commissioner further stated:

> The deficiency of $6,100.62 assessed against Adrienne B. Charles for the year 1928 will accordingly be abated and the claim for refund filed by William D. Judson, as trustee of the Adrienne B. Charles Trust, in the amount of $4,225.06 for the year 1928, will be rejected.
> Notice of the rejection of this claim will be issued in due course in accordance with the provisions of section 1103 of the revenue act of 1932.

The claim was rejected on a schedule dated September 22. 1932.

**12.** September 30, 1932, the Income Tax Unit of the Bureau of Internal Revenue advised the Accounts and Collections Unit of the same Bureau concerning the changes which had been made with respect to the overassessment in favor

of plaintiff and the deficiency against Adrienne B. Charles, as set out in the preceding finding, and recommended that the collector be authorized to reverse the credit on account of the overassessment of $4,225.06 in favor of plaintiff and be advised that a certificate of overassessment would be scheduled at an early date to abate the outstanding tax against Adrienne B. Charles. October 5, 1932, instructions were issued to the collector by the Accounts and Collections Unit in accordance with the foregoing advice from the Income Tax Unit.

**13.** Subseqently the Commissioner issued a certificate of overassessment in favor of Adrienne B. Charles for $6,852.75, which was listed on a schedule signed by the Commissioner October 7, 1932. This certificate of overassessment abated the deficiency of Adrienne B. Charles for 1928 in the amount of $6,100.62, with interest thereon.

The court decided that plaintiff was not entitled to recover.

LITTLETON, Judge, delivered the opinion of the court:

Plaintiff as trustee of the Adrienne B. Charles Trust, quoted in finding 1, sold during 1928 certain stocks and bonds which he held subject to the terms of a trust and realized a profit of $44,470.94. In March 1929 he filed a fiduciary return for 1928 reporting, among other income, this profit from the sale of trust securities. On the same day he filed an individual income tax return (as trustee) for 1928 showing a tax of $4,225.06 based upon the above-mentioned profit of $44,470.94. This tax he paid during 1929. At the time the returns mentioned were filed by the trustee, Adrienne B. Charles filed her individual income tax return for 1928 showing a tax of $40.49. Thereafter, in November 1930, subsequent to the death of Adrienne B. Charles, the life beneficiary under the trust, the Commissioner of Internal Revenue proposed a deficiency of $6,100.62 in respect of the income of Adrienne B. Charles for 1928, which proposed additional tax resulted from the conclusion reached by the Commissioner at that time that the profit of $44,470.94 from the sale of the securities mentioned was distributable under the terms

of the trust, and therefore was income to the beneficiary. Shortly thereafter plaintiff, as trustee, filed a claim for refund.

After the Commissioner had allowed an overassessment to the trustee and had assessed a deficiency against the beneficiary, he reversed his action on the ground that he had made a mistake. Thereupon he held that under the terms of the trust the profit in question was not to be distributed currently by the fiduciary to the beneficiary and that the profit from the trust had been correctly reported by the fiduciary in the return for 1928. Accordingly, he abated the additional assessment in respect of the income of Adrienne B. Charles for 1928 and rejected plaintiff's claim for refund. We are of opinion that the Commissioner's final decision was correct and that plaintiff is not entitled to recover in either action.

Section 162 of the Revenue Act of 1928 provides that the net income of an estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that there shall be allowed as an additional deduction, in computing the net income of the trust, the amount of the income of the estate or trust for its taxable year *which is to be distributed currently to the beneficiary.* The gain of $44,470.94 involved in this case was derived by plaintiff as fiduciary from the sale of a part of the trust corpus, and the question is whether it was income of the trust which was distributable to the life beneficiary under the terms of the trust instrument quoted in finding 1. Although this gain was "income" in a general sense, it does not follow that such gain was a part of the "net income" distributable to the beneficiary and taxable to her. In order to determine this question we must ascertain (1) the intention of the parties, (2) whether distribution was mandatory or discretionary under the terms of the trust, (3) whether distribution was in fact made, and (4) if the foregoing points are found in favor of plaintiff, the treatment of the gain under the laws of the state where the trust is being administered. The intention of the parties to the trust that the trustee was not required under the terms of the trust to distribute the profits is clearly established by the facts showing that they so construed the trust and when

it was proposed to treat the gain as income distributable to the beneficiary vigorous protests were made by both parties. We think it is also clear that the distribution of the income here involved was discretionary with the trustee. The provision of the trust quoted in finding 1 vested in the trustee the absolute and unrestricted discretion to pay to the beneficiary so much of the principal of the trust as the trustee might determine, even to the whole of the principal. It seems clear therefore that the profit derived from the sale of the trust property constituted an accretion to the trust corpus rather than the income from such corpus, and the profit derived from the sale of the securities in question was taxable to the trustee and not to the life beneficiary.

Subdivision (b) of section 162 of the Revenue Act of 1928 provides that in computing net income the trustee may claim as a deduction the amount of income for the taxable year which is to be distributed currently by the fiduciary to the beneficiary. No direction can be found in the trust instrument requiring the trustee to pay to the life beneficiary any portion of the corpus. That matter was committed to his discretion. Although the agreement required the trustee to receive and collect the "income, dividends, and profits" from the trust property, he was required to distribute to the beneficiary only the "net income." The item here in controversy was a profit derived from the sale of a part of the corpus of the trust as distinguished from income of the trust as the term "income" appears to have been used in the trust and as understood by the parties, and we find nothing in the trust agreement which required the trustee to distribute the profits. The intention of the parties to the trust, as evidenced by their actions, must be given effect in determining whether the income of the trust, including profit from the sale of the corpus, was by the terms of the trust to be distributed currently or in the discretion of the trustee. We think the facts and circumstances require the conclusion that the distribution of the profit in question was left entirely to the discretion of the trustee.

While state laws and decisions of state courts cannot restrict the operation of Federal taxing statutes, the law of the state where the trust was executed and administered is

persuasive in determining whether a profit is income of that character which must be distributed to the beneficiary under the terms of the trust in question. Under the decisions of the New York courts, the profit on the sale of the trust property is not distributable to the life beneficiary but increases the trust corpus.

We think the tax sought to be recovered was properly reported and paid by the trustee and no recovery can therefore be had. The petitions are dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## AUTOMATIC WASHER COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 42525. Decided June 1, 1936]

*On the Proofs*

*Capital stock sale or transfer tax; transfer of stock through authorized agent.*—In the reorganization of a corporation in 1928, one Nelson, a stockholder of the old corporation, pursuant to mutual agreement and to powers of attorney from the remainder of the stockholders, received from the new corporation its capital stock due, under the reorganization agreement, to the stockholders of the old corporation, a portion of which he delivered to an agreed purchaser thereof, receiving the purchase price therefor, and distributing to said stockholders the proceeds of the sale, together with the remainder of the stock; and transfer taxes were paid, under title VIII of the Revenue Act of 1926 (1) on the original issue of said stock, (2) on the stock transfer by Nelson to the said purchaser, (3) as upon a transfer by the old corporation to its stockholders of its right to receive the stock from the new corporation, and (4) also, but under protest, upon an alleged transfer by the said stockholders to Nelson of their rights to receive the stock received and delivered by him to the said purchaser. *Held*, as to the stock delivered by Nelson to the purchaser thereof, that Nelson was merely an intermediary, or agent of the stockholders in the transaction, the transfer of the stock being a transfer from the stockholders to the purchaser, the tax upon which was satisfied by the tax paid as upon the transfer by Nelson to the purchaser, and that the tax, penalty, and interest exacted as upon a transfer to Nelson of the stockholders' rights to receive the stock was, therefore, erroneously exacted.

*The Reporter's* statement of the case:

*Mr. Jesse I. Miller* for the plaintiff.

*Mr. J. W. Blalock*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Automatic Washer Company (hereinafter referred to as the "new company") is a corporation organized under the laws of the State of Delaware and having its principal place of business in the City of Newton, Iowa, where it is engaged in the business of manufacturing electric washing machines. Plaintiff's predecessor as owner of that business was Automatic Electric Washer Company, an Iowa corporation, hereinafter referred to as the "old company."

2. On June 22, 1928, one Harry E. Nelson, a stockholder and officer of the old company, entered into an agreement with Folds, Buck and Company, a corporation, hereinafter referred to as the "Bankers", the material portions of which were as follows:

> That he (Nelson) proposes to cause a reorganization of the Old Company whereby a new corporation to be organized under the laws of the State of Delaware (hereinafter called the "New Company") shall acquire all of the properties and assets of the Old Company. Upon such reorganization having been effected, the capitalization of the New Company shall be as follows:
>
> "Convertible preference stock, without any nominal or par value, authorized 40,000 shares; outstanding 40,000 shares;
>
> "Common stock, without any nominal or par value, authorized 180,000 shares; outstanding 180,000 shares, of which 40,000 shares shall be in the treasury of the company."
>
> Upon such reorganization having been effected, Nelson will desire to sell to the Bankers, upon the terms and conditions hereinafter stated, 40,000 shares of said convertible preference stock and 40,000 shares of said common stock at the aggregate price of $1,000,000.

It is therefore agreed between the parties as follows: Nelson hereby grants to the Bankers the option and privilege of purchasing 40,000 shares of said convertible preference stock and 40,000 shares of said common stock at the price aforesaid.

3. Pursuant to this agreement, the new corporation was organized and thereafter, about September 27, 1928, entered into an agreement with the old company, the material portions of which were as follows:

Automatic Washer Company, a corporation of the State of Delaware, has been organized at the instance of the stockholders of the Old Company to acquire all the property and assets and assume all the obligations of the Old Company reflected by its balance sheet as of June 30, 1928, prepared and certified to by Arthur Anderson & Company, of Chicago, Illinois, and such obligations as have resulted from the usual and ordinary conduct of the business of the Old Company subsequent to June 30, 1928. * * *

The capital stocks of the Old Company and the New Company are as follows:

*Automatic Electric Washer Co., Inc. (Old Company)*

| Authorized— | *Outstanding* |
|---|---|
| 6,150 shares common stock (par value $100 per share) | 3,412 shares |

*Automatic Washer Company (New Company)*

| Authorized— | *To be presently outstanding* |
|---|---|
| 40,000 shares Convertible preference stock (without any nominal or par value) | 40,000 shares |
| 180,000 shares common stock (without any nominal or par value) | 140,000 shares |

(40,000 shares of common stock are to be reserved for the conversion of convertible preference shares). * * *

All of the property and assets of the Old Company shall be conveyed to the New Company, and the New Company shall assume all of the liabilities of the Old Company disclosed by its Balance Sheet as of June 30, 1928, a copy of which is appended to this plan and marked "Exhibit A", and such liabilities of the Old Company as have resulted from the usual and ordinary conduct of the business of the Old Company subsequent

Reporter's Statement of the Case

to June 30, 1928. The Old Company agrees that it has no other liabilities. As consideration for such conveyance of said property and assets, the New Company shall deliver to the stockholders of the Old Company the following securities of the New Company:

| | |
|---|---|
| Convertible Preference Stock (without any nominal or par value) | 34, 538 shares |
| Common Stock without nominal or par value | 140, 000 shares |

Immediately upon the conveyance of all of the assets of the Old Company to the New Company, the stockholders of the Old Company shall be in control of the New Company. * * *

As a part of the plan of reorganization, the stockholders of the Old Company have agreed among themselves that each will contribute the shares of convertible preference stock of the New Company received by such stockholder in his pro-rata proportion of 40,000 shares of the common stock of the New Company, and that the total shares so contributed, viz: 34,538 shares of Convertible preference stock and 40,000 shares of common stock, shall be sold and delivered to Folds, Buck & Co. Bankers, of Chicago, Illinois, under the provisions of the agreement of date June 22, 1928 (as amended from time to time), between H. E. Nelson (acting as agent for all of the stockholders) and said Bankers. In order to carry out this plan whereby the stockholders of the Old Company will sell and deliver to the said Bankers said 34,538 shares of the convertible preference stock and 40,000 shares of the common stock of the New Company, each of the stockholders of the Old Company has irrevocably constituted and appointed H. E. Nelson and W. N. Gallagher his attorneys in fact to receive the respective securities of the New Company to which such stockholder may be entitled and to make sale of that portion thereof to be contributed by such stockholder for the purpose of carrying out said agreement of sale with the Bankers and to receive the purchase price for all of said shares of stock so sold and delivered to the Bankers, and distribute to each of the stockholders of the Old Company his proportionate share of the proceeds of such sale, after deducting all expenses of the said attorneys in fact therefrom.

Accordingly, the New Company, in making delivery to the stockholders of the Old Company of the shares of stock agreed to be delivered as consideration for the

acquisition of the property and assets of the Old Company shall issue such certificates in such names and for such amounts as shall be specified in the joint order of the said H. E. Nelson and W. N. Gallagher, the attorneys in fact for each of the stockholders of the Old Company, and deliver the same to said attorneys in fact, and certificates evidencing 34,538 shares of convertible preference stock and 40,000 shares of common stock shall be delivered by said attorneys in fact to or upon the order of Folds, Buck & Co., upon receipt of the sum of $868,912.00 (less the expenses to be deducted therefrom).

Upon the delivery by the said H. E. Nelson and/or W. N. Gallagher to said Folds, Buck & Co., of said 40,000 shares of Common Stock and said 34,538 shares of Convertible Preference Stock, and the receipt by the said H. E. Nelson and/or W. N. Gallagher of the said sum of $868,912.00 (less the expenses of Folds, Buck & Co., provided to be deducted), the said H. E. Nelson and/or W. N. Gallagher shall cause to be paid from the cash so received all expenses incurred by them and shall distribute to each stockholder of the Old Company for whom they have been so acting the following:

1. 1/3412 of the remaining cash for each share of Common Stock of the Old Company held by such stockholder.

2. 29.3 shares of Common Stock for each share of Common Stock held by such stockholder in the Old Company, being 1/3412 of the shares of stock distributable to the stockholders of the Old Company (other than shares so sold to Folds, Buck & Co., as aforesaid).

4. The powers of attorney referred to in Finding 3 were identically executed by all of the stockholders of the old company on September 17, 1928, the material portions thereof being as follows:

KNOW ALL MEN BY THESE PRESENTS, That I, ——— ———, do hereby nominate and appoint H. E. Nelson and W. N. Gallagher my true and lawful attorneys for me and in my name, place, and stead, at a special meeting of the Stockholders of Automatic Electric Washer Co., Inc. (hereinafter called the "Old Company"), to be held at the office of the Old Company, in the City of Newton, Iowa, on the 27th day of September 1928, at ten o'clock a. m., and at any and all adjournments of said meeting to vote upon all the stock

of the Old Company owned and/or controlled by me or standing in my name or which for any reason I am or shall be entitled to vote upon any and all questions, matters and/or business which may come before said meeting and particularly to vote upon the following matters and things: * * *

I do hereby authorize, direct, and require that my said attorneys or either of them receipt for and receive any and all dividends declared of the Old Company by way of liquidation or otherwise and to sell, exchange or dispose of, for me and in my behalf any and/or all property or assets so received, including all or any portion of the shares of stock or other securities of the New Company accruing to me, or to which I am or may become entitled by reason of the consummation of any plan of reorganization of the affairs of the Old Company and particularly I do hereby authorize and direct my said attorneys in fact to sell and dispose of any and/or all such shares of stock and/or securities in consummating the agreement or agreements now existing between the said H. E. Nelson and Folds, Buck & Company of Chicago, Illinois, as the same may from time to time be amended with the consent of the said H. E. Nelson.

I do hereby declare that in consideration of H. E. Nelson having made an agreement or agreements with Folds, Buck & Co. of Chicago, Illinois, for my benefit and the benefit of the other stockholders of the Old Company, in reliance upon my promise to execute and deliver this proxy and power of attorney the same shall continue in full force and effect until November 15, 1928 and shall not be subject to revocation.

5. Pursuant to these several agreements and authorizations, the old company, about October 1, 1928, transferred and conveyed to the new company all its assets, subject to all its liabilities, and the new company thereupon issued 140,000 shares of its common and 34,538 shares of its convertible preference stock as follows:

100,000 shares of common stock to the individual stockholders of the old company in the ratios of their respective stock holdings in the old company;

40,000 shares of common stock to the said Harry E. Nelson, pursuant to said powers of attorney, of which 7,069 shares were said Nelson's pro rata portion, as a stockholder of the old company, of the new common stock to be sold to the Bankers; and

34,538 shares of convertible preference stock to the said Harry E. Nelson pursuant to the said powers of attorney, of which 6,104 shares were said Nelson's pro rata portion, as a stockholder of the old company, of the new convertible preference stock to be sold to the Bankers.

**6.** Nelson thereupon sold and transferred to the Bankers the said 40,000 shares of common and 34,538 shares of preference stock, collected the proceeds thereof, and distributed the same among the stockholders of the old company.

**7.** Upon the original issue of the 140,000 shares of common and 34,538 shares of convertible preference stock, the new company duly paid the stamp tax imposed by Schedule A (2) of Title VIII of the Revenue Act of 1926 on each original issue of capital stock. It also duly paid the stamp tax imposed by Schedule A (3) of Title VIII on the subsequent transfer by Nelson to the Bankers of the 40,000 shares of common and 34,538 shares of convertible preference stock.

**8.** Thereafter the Commissioner of Internal Revenue demanded and collected from plaintiff, by threat of distraint and over plaintiff's protest, two additional stamp taxes on the foregoing transactions, alleged by him to be due and owing under Schedule A (3) of Title VIII upon the transfers of certain alleged rights to receive said shares of stock, viz:

(a) On November 17, 1932, a tax of $4,020.46 on the alleged transfer by the old company to its stockholders of its alleged right to receive from the new company 140,000 shares of common and 34,538 shares of convertible preference stock, and

(b) On May 4, 1931, a stamp tax of $1,490.76 on the alleged transfer by the old stockholders to Nelson of their alleged rights to receive the 40,000 shares of common and 34,538 shares of convertible preference stock ultimately sold to the Bankers, and, in addition, a penalty of $74.54 and interest in the sum of $28.33, or a total of $1,593.63.

**9.** The validity of the tax of $4,020.46 referred to in Finding 8 (a), has been sustained by the Supreme Court of the United States in *Raybestos-Manhattan Company* v. *United*

*States*, 296 U. S. 60, and plaintiff has abandoned and withdrawn its claim in respect of this item.

**10.** In respect of the item of $1,593.63, referred to in Finding 8 (b), plaintiff, on or about June 12, 1931, duly filed an application to the Commissioner of Internal Revenue, to wit, a claim for refund, praying for the return of the sum of $1,593.63, with interest, which claim was rejected by the Commissioner of Internal Revenue on or about November 10, 1931, and no part of which has ever been allowed or paid.

**11.** Plaintiff is the sole owner of the claim herein sued upon, and no assignment or transfer thereof or any part thereof, or any interest in the same, has been made. Plaintiff is a citizen of the United States and loyal to the United States Government, and has not at any time aided or abetted in any manner or given comfort to any sovereign government that is or ever has been at war with the United States.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, a Delaware corporation, sues to recover the amount of stamp taxes, interest, and penalty alleged to have been exacted by the Commissioner of Internal Revenue without warrant of law. The facts have been stipulated and no jurisdictional issue is involved.

The plaintiff is a successor corporation of the Automatic Electric Washer Company, incorporated under the laws of Iowa, and the controversy to be adjudicated revolves around a reorganization of the Iowa company. In this opinion, following the findings, we will designate the Iowa corporation as the "old company" and the plaintiff as the "new company."

Harry E. Nelson, a substantial stockholder in the old company preliminary to the reorganization of the same on June 22, 1928, granted in a written agreement an option to Folds, Buck & Company, hereafter known as the "Bankers", to purchase 40,000 shares of the convertible

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preferred and 40,000 shares of the common stock of the new company when the same was incorporated.

Nelson's reorganization plan comprehended the purchase by the new company of all the assets of the old one. The sale was to be accomplished by the issuance by the new company of 40,000 shares of convertible preferred and 180,000 shares of common stock to be, less 40,000 shares of common reserved as Treasury stock distributed among the stockholders of the old company as their stock interest in the old company appeared.

The new company was duly incorporated and subsequent thereto, i. e. on September 27, 1928, by the terms of an express agreement, carried out Nelson's original plan of reorganization as evidenced by the agreement of June 22, 1928, except in determining the *pro rata* contribution by the stockholders of the old company to the stock to be sold to the Bankers, the amount of the preferred to be sold was reduced to 34,538 shares.

The agreement of September 27, 1928, contained a provision whereby H. E. Nelson and W. N. Gallagher, or either one of them, acting under duly executed powers of attorney from the stockholders of the old company, should receive from the new one certificates of stock therein in accord with the powers of attorney, to the extent of 34,538 shares of convertible preferred and 40,000 shares of common, which in turn were to be sold and transferred to the Bankers for the sum of $868,912 and the proceeds distributed by Nelson among the stockholders of the old company for whom he was acting as attorney in fact as their interest therein appeared. In other words, the September agreement ratified the one of June 22, 1928, with additional provisions essential to complete the reorganization.

The findings disclose the agreements and the form of the powers of attorney. Gallagher did not act thereunder. Nelson alone acted. The statutes and regulations governing the case are as follows:

Section 800 of the Revenue Act of 1926 provides that:

> On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected,

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> and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title * * * the several taxes specified in such schedule. * * *

Schedule A (3) reads as follows:

> 3. Capital stock, sales, or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock * * * or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share; * * *.

Regulation 71, relating to stamp taxes on documents imposed by the Revenue Act of 1926 and the Revenue Act of 1928, contains the following provisions:

> ART. 31. BASIS OF TAX.—Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale * * * or delivery of or transfer of the legal title to shares, or certificates of stock * * * or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificates, or agreement or memorandum of sale.
>
> ART. 34. SALES AND TRANSFERS SUBJECT TO TAX.—The following transactions are subject to the tax:
>
> (a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.
>
> (b) The sale or transfer of shares of stock, whether or not represented by certificates.
>
> (c) The transfer of stock to or by trustees.
>
> * * * * *
>
> (g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

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(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

* * * * *

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

The process of completing the reorganization of the companies exacted, as stipulated by the parties, stamp taxes on, first, the original issue of all the stock issued by the new company, second, on the old company's transfer of its right to receive the new company's stock, third, on Nelson's transfer of the stock coming to him under the power of attorney to the Bankers, and, finally, upon the Bankers' sale of the stock to the public. With respect to these transactions the proper stamp taxes were fully paid.

The defendant contends that inasmuch as the new company was obligated to and did issue 100,000 shares of its common stock directly to the stockholders of the old company in the ratio of their respective holdings, and 40,000 shares of common stock, together with 34,538 shares of preferred stock, to Nelson, acting as attorney in fact for the stockholders, legal title to the last-named shares vested in Nelson. Therefore, the right to receive the stock Nelson sold to the bankers had to be transferred to Nelson in order to execute the sale to the bankers.

The argument advanced overlooks the decision of the Supreme Court in the case of *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60. The right to receive the stock of the new company was under the foregoing decision vested in the old company, and upon the transfer of this right to its stockholders the old company paid a stamp tax of $4,020.46, which the plaintiff now concedes it may not recover.

The findings conclude the plaintiff's right to recover a judgment. The status of the transaction clearly shows that what the stockholders of the old company did was to appoint an intermediary, an agent in fact, acting under powers of attorney, to execute for them a pre-existing

agreement to sell to the bankers the stock involved. This the attorney did, and upon the transfer of said stock paid the stamp tax exacted under the revenue act. *National Bond and Share Corporation* v. *Hoey*, 364 CCH, p. 9755.

Nelson, the stockholders' attorney in fact, owned in his own right 7,069 shares of common and 6,104 shares of preferred stock in the new company, i. e., he received this stock as his *pro rata* portion of the new stock because of his stock ownership in the old company, and this block of stock represented his contribution to the total amount of stock sold to the bankers. The defendant concedes that in no event would Nelson be taxable under the contention in this case.

The plaintiff is entitled to a judgment as follows: $1,490.76 tax paid, to which was added $74.54 penalty and $28.33 interest, totalling $1,593.63, with interest as allowed by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

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## GERTRUDE VANDERBILT WHITNEY ET AL., EXECUTORS OF THE ESTATE OF HARRY PAYNE WHITNEY, v. THE UNITED STATES

[No. 42640. Decided June 1, 1936]

*On the Proofs*

*Income tax; gain or loss on sale of stock acquired by exchange; determination of, where stock exchanged was acquired prior to March 1, 1913.*—The basis to be used in determining gain or loss, for income tax purposes, on the sale in 1926 of corporation stock acquired by the taxpayer by exchanging for it in 1922 stock acquired by him prior to March 1, 1913, was the cost or March 1, 1913, value, whichever was greater, of the stock exchanged for it, the gain or loss being the difference between such cost or 1913 value and the proceeds of the sale of the stock for which it was exchanged.

*The Reporter's* statement of the case:

*Mr. Will R. Gregg* and *Mr. John W. Fisher* for the plaintiffs.

*Mr. Guy Patten*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

Plaintiffs seek to recover $287,385.85, income tax alleged to have been erroneously and illegally collected for 1926. Prior to March 1, 1913, Harry Payne Whitney, the decedent, acquired certain shares of stock of the Standard Oil Company and of the R. J. Reynolds Tobacco Company. In October and November 1922 he exchanged this stock, in a transaction not in pursuance of a plan of reorganization, for certain stock of the Mammoth Oil Company and the Sinclair Consolidated Oil Company. The last-mentioned stock was sold in 1926.

Plaintiffs contend that the basis to be used in determining the loss deductible from income in 1926 as "cost" of the stock of the Mammoth Oil Company is the fair market value at the date of exchange in 1922 of the stock of the Standard Oil Company and the R. J. Reynolds Tobacco Company exchanged therefor, or, in the alternative, the fair market value of the stock of the Mammoth Oil Company at the date of the exchange in 1922.

The defendant contends that the stock of the Mammoth Oil Company received in the exchange in 1922 should be treated as taking the place of the stock of the Standard Oil Company and of the R. J. Reynolds Tobacco Company exchanged therefor, and that the basis to be used in determining gain or loss on the sale of the stock of the Mammoth Oil Company under the provisions of section 202 (c) and (d) of the Revenue Act of 1921, and sections 203 (b) and 204 (a) (6) of the Revenue Act of 1926 is the cost or March 1, 1913, value, whichever is greater, of the stock of the Standard Oil Company and the R. J. Reynolds Tobacco Company exchanged for the stock of the Mammoth Oil Company.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Harry Payne Whitney, a resident of New York, died October 26, 1930. He left a will which was duly probated in the Surrogate's Court of New York County November 7, 1930, and letters testamentary were issued to the plaintiffs November 8, 1930. The plaintiffs are now and have been continuously executors of the estate.

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2. The decedent prior to March 1, 1913, acquired for investment 2,000 shares of the common stock of the Standard Oil Company of New York, 8,000 shares of the common stock of the Standard Oil Company of New Jersey, and 29,000 shares of the common "B" stock of the R. J. Reynolds Tobacco Company. The cost and March 1, 1913, value of such stock were as follows:

| | March 1, 1913 | |
|---|---|---|
| | Cost | Value |
| 2,000 shs., Standard Oil Co. of New York | $96,000.00 | $260,000.00 |
| 3,040 shs., Standard Oil Co. of New Jersey | 346,392.80 | 283,100.00 |
| 4,960 shs., Standard Oil Co. of New Jersey | 783,680.00 | 461,900.00 |
| 6,000 shs., R. J. Reynolds Tobacco Co | 65,000.00 | 91,296.00 |
| 23,000 shs., R. J. Reynolds Tobacco Co | 249,435.00 | 349,968.00 |

3. In October 1922 the decedent, in a transaction not in pursuance of a plan of reorganization, exchanged 2,000 shares of the common stock of the Standard Oil Company of New York, 8,000 shares of the common stock of the Standard Oil Company of New Jersey, and 6,000 shares of the common "B" stock of the R. J. Reynolds Tobacco Company for 50,000 shares of the common stock of the Mammoth Oil Company and 55,000 shares of the common stock of the Sinclair Consolidated Oil Company. The exchange was not returned for income tax purposes and the taxpayer did not pay any income or profits tax thereon. On the date of the exchange the fair market value of the various shares of stock exchanged and acquired upon the exchange was as follows:

| | Fair Market Value on date of exchange in October 1922 |
|---|---|
| 2,000 shs., Standard Oil Co. of New York | $1,294,000.00 |
| 8,000 shs., Standard Oil Co. of New Jersey | 1,890,000.00 |
| 6,000 shs., R. J. Reynolds Tobacco Co | 336,000.00 |
| Total | $3,520,000.00 |
| 50,000 shs., Mammoth Oil Co | $1,750,000.00 |
| 55,000 shs., Sinclair Consolidated Oil Co | 1,768,750.00 |
| Total | $3,518,750.00 |

4. In November 1922 the decedent, in a transaction not in pursuance of a plan of reorganization, exchanged 23,000

shares of the common B stock of the R. J. Reynolds Tobacco Company for 55,000 shares of the common stock of the Mammoth Oil Company. The exchange was not returned for income tax purposes and the taxpayer did not pay any income or profits tax thereon. On the date of the exchange the fair market value of the 23,000 shares of B stock of the R. J. Reynolds Tobacco Company was $1,242,000, and the fair market value of the 55,000 shares of common stock of the Mammoth Oil Company was $1,237,500. July 18, 1924, the decedent purchased 8,248 shares of the common stock of the Mammoth Oil Company for $139,555.60 cash.

**5.** During the year 1926 the decedent sold the aforesaid 113,248 shares of common stock of the Mammoth Oil Company for $3,000, and in making the sale he incurred and paid expenses of $6,798.88.

**6.** June 15, 1927, decedent and his wife, Gertrude Vanderbilt Whitney, one of the plaintiffs herein, filed a single income tax return of their joint net income for 1926 showing a tax liability of $262,066.51, which was assessed and paid during 1927. On this return the amount of $3,135,973.68 was deducted as the loss sustained upon the sale of the 113,248 shares of common stock of the Mammoth Oil Company, the amount of the loss being computed upon the theory that the basis for determining the loss upon the sale of the 105,000 shares acquired in the exchanges described above was the fair market value on the dates of exchange of the shares of stock exchanged therefor and was computed as follows:

| | Basis |
|---|---|
| 50,000 shs., Mammoth Oil Company stock: That proportion of the fair market value of the shares of stock exchanged which the fair market value of the Mammoth Oil Company stock bore to the total fair market value of all the shares of stock received upon the exchange $\left(\frac{1,750,000}{3,518,750}\right.$ of $3,520,000) | $1, 750, 619. 20 |
| 55,000 shs., Mammoth Oil Company stock: The fair market value at the date of exchange of the shares of stock exchanged therefor | 1, 242, 000. 00 |
| 8,248 shs., Mammoth Oil Company stock: The cost thereof in July 1924 | 139, 555. 60 |
| 113,248 shs | $3, 132, 174. 80 |

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| | | | Basis |
|---|---|---|---|
| Proceeds of sale of the 113,248 shares in 1926 | | $3,000.00 | |
| Expenses of sale: | | | |
| Commissions | $2,264.96 | | |
| Transfer Stamps | 4,529.92 | | |
| Advertising | 4.00 | | |
| | | 6,798.88 | |
| Excess of selling expenses over proceeds | | | $3,798.88 |
| Loss deducted on tax return | | | $3,135,973.68 |

In a memorandum attached to the return for 1926, the aforesaid exchanges of stock were further explained as follows:

> The exchange in 1922 by the taxpayer of stock of the Standard Oil Company of New Jersey, Standard Oil Company of New York, and R. J. Reynolds Tobacco Company for stock of the Mammoth Oil Company resulted in a gain to the taxpayer, but this gain was not included in the 1922 return of this taxpayer, as it was exempt from taxation by Section 202 (c) (1) of the Revenue Act of 1921 (prior to the amendment of 1923), which specifically provided that for income tax purposes such gain should not be recognized.

**7. Thereafter the Commissioner examined the return, and determined and assesesd an additional tax for 1926 of $240,-312.30. This additional tax, together with interest thereon of $49,580.05, was paid September 5, 1930.**

The additional tax was caused in part by a redetermination of the loss sustained upon the sale of the 105,000 shares of Mammoth Oil Company stock, the Commissioner determining that the basis for computing the loss was the cost or March 1, 1913 value, whichever was greater, of the shares of stock exchanged for the 105,000 shares of stock of the Mammoth Oil Company, and in accordance with such determination he redetermined the loss as follows:

| | |
|---|---|
| 50,000 shs., Mammoth Oil Company stock: That proportion of the cost or March 1, 1913, value (whichever was greater) of the shares of stock exchanged which the fair market value of the Mammoth Oil Company stock bore to the total fair market value of all the shares of stock received upon the exchange ($\frac{1,750,000}{3,518,750}$ of $1,481,368.80) | $736,738.03 |

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| | |
|---|---|
| 55,000 shs., Mammoth Oil Company stock: The March 1, 1913, value of the shares exchanged therefor | $349, 968. 00 |
| 8,248 shs., Mammoth Oil Company stock. The cost thereof in July 1924 | 139, 555. 60 |
| 113,248 shs | $1, 226, 261. 63 |
| Excess of selling expenses over proceeds of sale in 1926 | 3, 798. 88 |
| Loss as determined by Commissioner | $1, 230, 060. 51 |
| Loss deducted on return by decedent and his wife | 3, 135, 973. 68 |
| Amount by which the Commissioner increased income | $1, 905, 913. 17 |

8. January 19, 1931, plaintiffs filed claim for refund of $238,239.14 of the additional tax paid and likewise for the refund of the interest of $49,146.71 on the ground that the basis for determining the loss on the sale of the 105,000 shares of stock of the Mammoth Oil Company was the fair market value at the dates of exchange of the shares of stock exchanged therefor, or, in the alternative, that the basis for determining the loss on the sale was the fair market value of the stock of the Mammoth Oil Company when received in October and November 1922. The claim for refund was rejected April 29, 1932.

9. If the correct basis for determining the loss on the sale in 1926 of the 105,000 shares of stock of the Mammoth Oil Company is the fair market value thereof when received by decedent in October and November 1922, or the fair market value at the dates of exchange of the securities given up by the decedent in October and November 1922 in exchange for the 105,000 shares of stock of the Mammoth Oil Company, then plaintiffs are entitled to recover $287,335.07, or $287,385.85, respectively, together with interest from September 5, 1930, otherwise plaintiffs are not entitled to recover.

The court decided that plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The provisions of the Revenue Act of 1921, as amended by the act of March 4, 1923, and the Revenue Act of 1926

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relating to the question presented in this case are set forth in the footnote.[1]

When the decedent acquired the stock of the Mammoth Oil Company in 1922 he became the owner of property which, at that time, was worth $1,905,913.17 more than the cost to him or the March 1, 1913, value of the stocks of the Standard Oil Company and the R. J. Reynolds Tobacco Company which he exchanged therefor. However, this gain was not taxable for the reason that the 1921 Revenue Act provided that no gain or loss should be recognized upon

[1] Revenue Act of 1921, sec. 202 (c). "For the purposes of this title, on an exchange of property, real, personal, or mixed for any other such property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value; but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized—

"(1) When any such property held for investment, or for productive use in trade or business (not including stock-in-trade or other property held primarily for sale), is exchanged for property of a like kind or use; * * *

"SEC. 202 (d) (1) Where property is exchanged for other property and no gain or loss is recognized under the provisions of subdivision (c), the property received shall, for the purposes of this section, be treated as taking the place of the property exchanged therefor, except as provided in subdivision (e)."

Act of March 4, 1923. "That paragraph (1) of subdivision (c) of section 202 of the Revenue Act of 1921 is amended, to take effect January 1, 1923, to read as follows: (1) When any such property held for investment, or for productive use in trade or business (not including stock-in-trade or other property held primarily for sale, and in the case of property held for investment not including stock, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest), is exchanged for property of a like kind or use."

Revenue Act of 1926. "Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

"(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation. * * *

"SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—* * *

"(6) If the property was acquired upon an exchange described in subdivision (b), (d), (e), or (f) of section 203, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. * * *."

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exchange of property held for investment. But this was not a tax exemption under the 1921 Act. That provision of the 1921 Act was based upon the principle that nothing of substance had happened since the stock received in exchange simply took the place of the stock exchanged therefor. The basis to be used in determining gain or loss on the sale or disposition of the newly acquired stock was therefore plainly the cost or the March 1, 1913, value of the old stock exchanged therefor.

One of plaintiffs' contentions is that the basis for the determination of gain or loss on the sale or disposition of new stock was the value in 1922 of the old stock exchanged therefor. Under this contention the decedent could, except for the provisions of section 202 (d) (1) of the 1921 Act, have sold the stock of the Mammoth Oil Company for its then realizable market value immediately upon completion of the exchange and realized an actual cash profit of $1,905,-913.17 without any portion thereof being subject to income tax. It is clear, we think, that this would have been contrary to the plain purpose and intent of section 202 (c) (1) of the 1921 Act, even though subdivision (d) (1) thereof had not been enacted. Subdivision (d) (1) of section 202 plainly prohibited such a result. It provided that "Where property is exchanged for other property and no gain or loss is recognized under the provisions of subdivision (c), the property received shall, for the purposes of this section, be treated as taking the place of the property exchanged therefor, except as provided in subdivision (e)." This provision only made plain what otherwise would have followed in practice in exchanges of this character, namely, that the basis of the new stock should be the basis of the old stock exchanged for it.

Plaintiffs argue that section 204 (a) (6) of the Revenue Act of 1926 relates only to exchanges which are tax free under that act and to exchanges of the same kind which were taxable under earlier acts, and that in drafting section 204 (a) (6) of the 1926 Act Congress overlooked the fact that certain exchanges therein made taxable had been free of tax under the act of 1921. It is upon this interpretation of the 1926 Act that they based their claim for a loss in 1926

of $1,905,913.17 in excess of their actual loss. When Congress provided by section 202 (c) of the Revenue Act of 1921 that no gain or loss should be recognized in the case of an exchange of property held for investment, we think it is clear that it did not overlook the fact that the property received upon such exchange might thereafter be sold. In order, therefore, that no permanent tax exemption of gain might be given or loss denied, subdivision (d) (1) of the section was enacted to make it plain that the property received should take the place of the property exchanged therefor. Thus Congress provided for the ultimate determination of gain or loss upon the basis of actual facts and we are of opinion that this rule was not changed by sections 203 (d) (1) and 204 (a) (6) of the Revenue Act of 1926.

Section 202 (c) (1) of the 1921 Act was amended by the Act of March 4, 1923, by which amendment gain or loss was recognized for income tax purposes upon exchanges of the character involved in the case at bar. This act of 1923 did not amend section 202 (d) (1) of the 1921 Act, thereby preventing an increase of basis in the case of non-taxable exchanges under the Revenue Act of 1921. In this amendment of the 1921 Act it is clear that Congress was aware of the fact that such exchanges had theretofore been non-taxable.

That portion of section 204 (a) (6) of the Revenue Act of 1926 heretofore quoted, and upon which plaintiffs rely, is identical with section 204 (a) (6) of the Revenue Act of 1924, and we think it is clear that Congress did not overlook the fact in the enactment of these two statutes in 1924 and 1926 that exchanges of property of the character here involved had theretofore been non-taxable. The report of the Committee on Ways and Means, 68th Congress, 1st Sess., with reference to the basis for determining gain or loss stated with reference to section 204 of the Revenue Act of 1924, as follows:

> (2) Paragraph (6) corresponds to section 202 (d) (1) of the existing law [Act of 1921]. The general theory of this section is that where no gain or loss is recognized as resulting from an exchange, the new property received shall, for purposes of determining

Syllabus

gain or loss from a subsequent sale and for depreciation and depletion, be considered as taking the place of the old property given up in connection with the exchange. The provisions of section 203 of the bill that no gain or loss is recognized from certain exchanges do not grant an exemption and are not so intended. * * *.

What we have stated above shows, we think, that Congress was aware at all times that certain of the exchanges of property "described" in the statutes subsequent to the 1921 Act and including the Act of 1926 were non-taxable under the Revenue Act of 1921. The history of the entire legislation on this subject compels the conclusion that by sections 204 (a) (6) and 203 (b) (1) of the Revenue Act of 1926 Congress intended to continue to regard non-taxable exchanges under the 1921 Act as they had been treated by that act with respect to the basis to be used in the determination of gain or loss upon the sale or disposition of new stock received upon such exchanges.

We think the Commissioner was clearly right in his determination, and plaintiffs are not entitled to recover. The petition is therefore dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

## COMBINED INDUSTRIES, INC., v. THE UNITED STATES

[No. 42822. Decided June 1, 1936]

*On the Proofs*

*Income tax; consolidated return; payment of affiliate's tax by principal; affiliation disallowed; assumption by principal of affiliate's tax liability.*—Where the plaintiff, a corporation, made a consolidated income tax return for itself and an assumed affiliate for the year 1923 showing a loss by plaintiff and no income tax due from it and a reduction of the affiliate's taxable income by the amount of plaintiff's loss, and the tax shown due by the return was paid by plaintiff, and consolidation was disallowed, plaintiff must be held to have assumed the tax liability of the affiliate; and in the absence of proof

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to the contrary, or that there has been no reimbursement of plaintiff or agreement by the affiliate for reimbursement, plaintiff is not entitled to recover for such payment of tax by it; and it is immaterial that the Commissioner of Internal Revenue, prior to final determination and action in the matter, went through the process of allowing an overpayment in favor of plaintiff for the amount of the payment, which, however, was finally withheld and applied as payment on the tax as due from the affiliate.

*The Reporter's* statement of the case:

*Mr. N. Norman Mayer* for the plaintiff.

*Mr. G. W. Billings*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

Plaintiff seeks to recover $1,627.39 with interest, income tax for 1923 alleged to have been erroneously and illegally collected. Plaintiff had no taxable income for 1923. A consolidated return for this year was filed in which the net loss of $2,476.23 of the plaintiff was deducted from the net income of another corporation included in the consolidated return, and the resulting tax in the amount mentioned was paid by plaintiff. It was subsequently held that the two corporations were not affiliated and plaintiff filed a claim for refund for the tax mentioned.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

**1.** Plaintiff, a New York corporation, was and is engaged in holding shares of stock in subsidiary and affiliated companies and in financing their operations.

March 21, 1924, plaintiff filed a consolidated income tax return for 1923 for itself and Parker Sheet Metal Works, Incorporated, also a New York corporation, reporting therein their income and loss and the tax payable on a consolidated basis. The only net income reported on the consolidated return was the income of the Parker Sheet Metal Works of $17,495.45, from which was deducted a net loss of plaintiff of $2,476.23. The tax due on the basis of this consolidated return was $1,627.39. Payment thereof was made through the medium of checks of plaintiff, dated March

4, 1924, September 9, 1925, and June 8, 1926, in the amounts of $406.85, $200.00, and $1,087.57, respectively, interest on the past-due tax being included therein.

**2.** The Commissioner of Internal Revenue subsequently determined that plaintiff and the Parker Sheet Metal Works were not affiliated within the meaning of the law and regulations and that the computation of the tax for 1923 on the basis of a consolidated return was not authorized. He thereupon determined, as shown by the return, that plaintiff had sustained a net loss of $2,476.33 for 1923, and that no income tax was due from plaintiff for that year. He further determined, as shown in the return, that the Parker Sheet Metal Works had a net income of $17,495.45 for 1923 and that it was liable for income tax for that year of $1,936.93 on such income.

**3.** July 1, 1926, plaintiff filed a claim for refund of $1,627.39 and interest of $61.03 from the several dates of payment of the original tax shown on the consolidated return.

The Commissioner allowed said claim October 6, 1928, issued a certificate of overassessment covering the amount of the tax paid by plaintiff, and the overassessment was entered on an overassessment schedule signed by the Commissioner October 6, 1928.

**4.** May 26, 1928, the Commissioner wrote to Vincent H. Rothwell, then attorney in fact for the plaintiff, a letter, in part as follows: "If the Combined Industries, Incorporated, desires to apply the overassessment as a credit to the additional tax due from the Parker Sheet Metal Works, Incorporated, a statement requesting that such adjustment be made should be forwarded to this office by the Combined Industries, Incorporated, together with the enclosed waiver form properly executed."

July 13, 1928, the Commissioner again wrote to Rothwell as follows: "Inasmuch as the Parker Sheet Metal Works, Incorporated, has been dissolved and is now entirely without funds to pay the additional tax, and it is held necessary that any tax based on a transfer of income be paid before the overassessment resulting from the transfer can be allowed, it is requested that this office be advised relative to

paragraph 3 of Bureau letter dated May 25, 1928, wherein it is stated that the overassessment for the year 1923 in favor of the Combined Industries, Incorporated, may, with the consent of the corporation, be applied as a credit to the additional tax assessed against the Parker Sheet Metal Works, Incorporated."

**5.** Plaintiff has at no time requested the Commissioner to apply the overassessment to the tax liability of Parker Sheet Metal Works, Incorporated, and has at no time consented to the application of the overassessment in that manner.

November 13, 1928, the collector at New York wrote plaintiff a letter as follows:

> I am holding a check drawn in your favor by the Disbursing Clerk of the Treasury Department on account of an overpayment or overassessment of income tax for the year 1923 in the amount of $——— and interest in the amount of $250.80.
>
> Before I can release this check I will have to ask you to make a statement that there are no outstanding internal revenue taxes against you, which are due and payable, in this or any other office of a Collector of Internal Revenue.
>
> It will also be necessary to state if you took credit in your income tax return filed during the current year for any amount representing an overpayment of tax on account of a prior year's account. If such credit was taken, please state the amount thereof and when the alleged overpayment of tax was made.

This check was not delivered to the plaintiff or to any one for it.

**6.** Refund of the amount of $1,627.39 paid by plaintiff on the consolidated return in respect of the tax due on the income of the Parker Sheet Metal Works for 1923 has not been made by the Commissioner, nor has any credit been given to plaintiff for such amount against any prior or subsequent tax liability of the plaintiff.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

It is clear from the facts in this case that the plaintiff is not entitled to recover. See *Mahoning Investment Co.* v.

*United States*, 78 C. Cls. 231; *Wilson & Co., Inc.*, v. *United States*, 82 C. Cls. 261, decided January 6, 1936.

Plaintiff had no taxable income for 1923 but, on the contrary, it had a loss. In the consolidated return which the plaintiff filed for itself and the Parker Sheet Metal Works for 1923 plaintiff deducted its loss of $2,476.33 from the net income of $17,495.45 of the Parker Sheet Metal Works and remitted to the collector the resulting tax of $1,627.39 shown on this consolidated return. It is clear from these facts that if plaintiff paid this tax out of its own funds it knew that it owed no tax for 1923 and that it was paying the tax due on the income of the Parker Sheet Metal Works for that year.

The facts fail to show that plaintiff did not assume the tax liability of the Parker Sheet Metal Works and they also fail to show that plaintiff was not reimbursed for the amount which it remitted to the collector, or that the Parker Sheet Metal Works did not agree to reimburse it. The tax paid by plaintiff, and more, was due from the Parker Sheet Metal Works and plaintiff knew when he paid the amount sought to be recovered that it was paying the tax of the Parker Sheet Metal Works. In these circumstances it must be held that plaintiff assumed such tax. *Wilson & Co., Inc.* v. *United States*, *supra*. Moreover, one who in due course knowingly and voluntarily pays to the Government a tax of another, when the person for whom such tax was paid owed the amount remitted, cannot recover the amount paid on the sole ground that he had no income and owed no tax for the year for which such payment was made. The consolidated return prepared by plaintiff showed upon its face that the tax computed thereon was the tax of the Parker Sheet Metal Works and the fact that the amount thereof was assessed in the name of plaintiff is not controlling. The manner in which the tax was assessed does not alone justify a refund. *Mahoning Investment Co.* v. *United States*, *supra*; *Muir* v. *United States*, 78 C. Cls. 150.

Although the Commissioner went through the process of allowing an overpayment of $1,627.39 in favor of plaintiff and withholding the amount and applying it in partial satisfaction of the tax due by the Parker Sheet Metal Works for

1923, this was not necessary. But in the circumstances of this case he was correct in doing this. Under the facts he could legally have held the amount without formally assessing it against the Parker Sheet Metal Works or without allowing the amount as an overassessment against plaintiff.

The petition is dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice,* concur.

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## THE CITIZENS AND SOUTHERN NATIONAL BANK AND LETTIE P. EVANS, EXECUTORS OF J. B. WHITEHEAD, DECEASED, v. THE UNITED STATES

[No. 42829. Decided June 1, 1936]

*On the Proofs*

*Income tax; deductible loss; gambling losses where gambling not illegal.*—Upon a finding of fact that gambling transactions of the taxpayer in 1931 at Cannes and Deauville, France, where such transactions were not illegal, were not entered into for profit; *held,* that he was therefore not entitled to deduction of losses sustained by him in such transactions in determining his net taxable income for the year.

*Construction of statute.*—The words "any transaction entered into for profit", in the tax law providing for deduction from income of the taxpayer of losses in transactions entered into by him for profit, connote transactions for profit in the reasonable or business sense of the term.

*Proof; sufficiency of evidence.*—Where the taxpayer's gambling transactions for a number of years prior to 1931 were admittedly not entered into for profit, and were consistently at a financial loss to him, his testimony alone that such transactions for the year 1931 were entered into for profit is not sufficient evidence thereof in the establishment of a claim for deduction of losses by him in such transactions in determining his 1931 net taxable income.

*The Reporter's* statement of the case:

*Mr. Daniel J. Gantt* for the plaintiffs.

*Mr. Joseph H. Sheppard,* with whom was *Mr. Assistant Attorney General James W. Morris,* for the defendant.

Reporter's Statement of the Case

The court made special findings of fact as follows:

1. Plaintiffs are the executors of J. B. Whitehead (hereinafter sometimes referred to as the "decedent") who died during November 1935. The decedent was a citizen of the United States and a resident of Atlanta, Georgia.

2. On March 7, 1932, the decedent filed his income-tax return for the calendar year 1931 showing a net income of $253,908.11 and disclosing a tax liability of $42,441.62, which was paid in installments as follows:

| | |
|---|---|
| March 7, 1932 | $10, 610. 41 |
| June 14, 1932 | 10, 610. 41 |
| September 16, 1932 | 10, 610. 40 |
| December 13, 1932 | 10, 610. 40 |

On October 4, 1933, the Commissioner of Internal Revenue issued a certificate of overassessment in amount of $229.01 and refunded that sum to the decedent.

3. On January 22, 1934, the decedent filed a claim for refund with the Collector of Internal Revenue claiming the sum of $8,396.00 refund for the year 1931, giving as reasons in support thereof the following:

> Taxpayer for the calendar year 1931 made an income-tax return which showed a taxable net income of $253,908.11, and paid an income tax thereon of $42,441.62, which was corrected by a revenue agent to show $252,763.06 income and $42,212.61 tax.
>
> In the preparation of said return, no deductions were taken for gaming losses sustained by taxpayer during the year at Cannes and Deauville in the Republic of France, where gaming is legally permitted, and in support of such losses copies of cancelled checks and affidavits are submitted.
>
> Taxpayer's net income and tax should therefore be as follows:
>
> | | |
> |---|---|
> | Net income as corrected by agent | $252, 763. 06 |
> | Less: Gambling losses not claimed on return | 41, 980. 00 |
> | Corrected net taxable income | $210, 783. 06 |

4. On February 24, 1934, the Commissioner of Internal Revenue advised the decedent by letter that his claim for refund would not be allowed because the transactions were not entered into for a livelihood but were entered into for a pastime. The claim was rejected on a schedule dated May 9, 1934.

**5.** During the calendar year 1931 the decedent lost $41,-980.00 at chemin de fer at Cannes and Deauville, Republic of France, in which places gaming is legally permitted. The transactions were not entered into for profit.

**6.** The decedent was not a professional gambler and never attempted to earn his livelihood by gambling. During the year 1931 the decedent was president of the Whitehead Realty Company of Atlanta, Georgia, a corporation, the stock of which was owned by his mother, his brother, and himself, and all of which had been inherited from his father. He paid little attention to its affairs.

**7.** During the year 1931 the decedent was living in Paris, France, where he had lived since the year 1921, and he visited Cannes and Deauville during the regular seasons at those resorts and remained "off and on" for approximately six weeks at each place. The decedent had been visiting those resorts for at least 10 years and had played chemin de fer there for six or seven years prior to 1931. During that entire period he was never a winner when he left the casino.

**8.** In playing chemin de fer the croupier's percentage is 5% of the bank, which is taken out after each play. In twenty plays the croupier's percentage would entirely consume the original stake if the player did not win in the meantime. The decedent had made a study of the game and knew that the odds were against him, but he pitted his luck against the odds and lost.

**9.** Some of the chips bought by the decedent included in the loss referred to in finding 5 herein were used to purchase drinks at the bar during the course of his play, but the amount expended for this purpose is not disclosed by the record.

**10.** The decedent kept no book records of his gambling losses, the only record available being the checks which he issued to the casino at the end of his visits to cover his accounts there.

**11.** Since 1921 the decedent spent most of his time in Europe with headquarters in Paris. His income was derived from dividends on property left him by his father. He devoted little time looking after this property. The only

business he had in Europe during the time was connected with a corporation which he organized in 1929 or 1930 in conjunction with two other persons with offices on Avenue des Champs, Paris, to engage in the general loan business. The capital of the corporation was approximately $20,000.00, which was all contributed by the decedent. The decedent as a witness could not recall the name of this corporation and could relate practically nothing about its business, which was probably closed down about 1931. The only money he ever earned was the compensation he received while serving in the Navy during the World War.

The court decided that plaintiffs were not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This is a suit for the recovery of income tax for 1931. The one question involved is whether plaintiffs are entitled to a deduction on account of losses sustained by their decedent in gambling transactions in France at places where gambling was carried on legally. The applicable statute, section 23 (e), Revenue Act of 1928, provides for the allowance of deductions for losses, if not compensated by insurance or otherwise,

> (1) if incurred in trade or business; or
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business.

Admittedly the decedent was not engaged in gambling as a trade or business and the losses were not compensated by insurance or otherwise. The deduction is accordingly allowable, if at all, by virtue of the second proviso which permits the allowance of the deduction if the transactions were entered into for profit even though not connected with his trade or business. The parties agree that the loss claimed was sustained, except to a possible negligible amount, and therefore the sole question remaining, is whether the transactions were entered into for profit, a question of fact.

We have found adversely to plaintiffs on the factual question. We are satisfied the record fully justifies a finding that the transactions were not entered into for profit. The de-

cedent was an individual who had inherited a great fortune and who had never earned any money, except for a short time when he was in the Navy during the World War. While testifying in 1935 he could not give an accurate statement of his net worth though he estimated that it was approximately $2,500,000. His income for 1931 (approximately $250,000) was derived from dividends on inherited property and while he was nominally the head of one of the corporations in which he held stock he gave little time to the direction of its affairs or the affairs of any other property in which he was interested. He could not give the name of a Parisian corporation in which he had invested a considerable sum although it had only gone out of business in 1931.

From 1921 to 1935 the decedent spent most of his time in Europe with headquarters in Paris where he led a life of leisure and as a so-called "sportsman." During these fourteen years he visited Cannes, Deauville, and other pleasure resorts spending approximately six weeks in each regular season at each of the two places mentioned. He was not a professional gambler, but, while at the various places where gambling was permitted, he indulged in that alluring pastime, particularly at Cannes and Deauville where he played chemin de fer. His testimony is that he played that game at those places for six or seven years prior to 1931, but that he was never a winner when he left a casino. We understand from the latter statement that he did win at times, but that the net result of play at all times was a loss. The losses in those years were not of the magnitude sustained in 1931; they are not involved in this proceeding and decedent testified that they were not entered into for profit. We do not have, therefore, a situation which sometimes arises where an individual has been taxed in the "fat" years and denied losses in the "lean" years. Cf. *Beaumont* v. *Helvering*, 73 Fed. (2d) 110.

In spite of the lack of success attending his efforts over six or seven years, and in the face of the fact that the decedent realized the odds were against him—and his past experience bore eloquent testimony to that effect—he testified that he played the game in 1931 for profit when he lost

the large amounts which are now claimed as deductions, and that he resorted to it for that purpose for the reason that his large income was insufficient to meet his expenses, including alimony to two wives and a pending breach of promise suit for half a million dollars. What the decedent would have us believe is that, in a game where he had consistently lost for years and where he realized the odds were against him, he proceeded to that source for the purpose of realizing a profit to meet his mounting expenses. He is the only witness and his memory is clouded as to all other transactions except this particular gambling venture.

Such testimony overtaxes our credulity and stretches credence to the breaking point. We do not understand that every time a game of chance is entered into with the evanescent hope that the player will win constitutes a transaction entered into for profit within the meaning of the statute. In our opinion, the words used connote transactions for profit in the reasonable sense that any business is undertaken. Surely, a reasonably prudent business man would not embark in a business venture where the odds were admittedly against him and where his own unbroken line of experience had demonstrated over a period of years that losses would be the only fruit of his efforts. Of course, many people engage in such pastimes, even though the vast majority of them lose, and it must be so, otherwise the gambling casino could not stay in existence. But profit in the business sense is not what usually motivates the continued playing; it is the thrill and exhilaration which are inherent in taking a chance. As the Board of Tax Appeals said in *Louis D. Beaumont*, 25 B. T. A. 474 (affirmed *Beaumont* v. *Helvering*, 73 Fed. (2d) 110), all gambling transactions are not entered into for profit within the meaning of the statute.

The system evolved and used by the decedent, as a result of the study which he said he had made of the game, seems nothing more than a vaporous supposition that luck would attend his efforts if followed in a certain sequence, even though he knew the odds were against him and that losses by players made possible the continued operation of the club. The losses sustained are apparently large but, when

Syllabus

considered in relation to his great wealth, large income and his modern standards and previous habits of living, the amounts lost are not more than a man of this type might well be expected to spend in the pursuit of pleasure.

On the whole we are satisfied that the record does not establish that the gambling transactions which resulted in the losses claimed were entered into for profit within the meaning of the statute. The petition must accordingly be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice, concur.*

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## E. PENNINGTON PEARSON, ADMINISTRATOR OF THE ESTATE OF FREDERICK F. AYER, DECEASED, v. THE UNITED STATES

[No. 41837. Decided June 1, 1936. Findings of fact amended, with opinion, January 11, 1937, on motion for new trial]

*On the Proofs*

*Estate tax; interest on overpayment resulting from retroactive statute; section 325 of Revenue Act of 1926.*—Where a payment of estate tax in 1925 under the provisions of the Revenue Act of June 2, 1924, subsequently resulted in an overpayment under the retroactive provisions of the Revenue Act of 1926 amending the 1924 act to reduce estate tax rates as of the date of its enactment, such overpayment constituted a prior payment in excess of the tax imposed by the 1924 act as amended, within the meaning of section 325 of the act of 1926 providing for refund without interest of such excess payments of taxes, and interest thereon is therefore not allowable.

*Same.*—A payment in 1925 of the estate tax shown due by the tax return under the Revenue Act of 1924, *with deduction for State tax*, which payment, without deduction for State tax, was not in excess of the tax imposed by the act of 1924 as amended by the Revenue Act of 1926 retroactively reducing estate tax rates as of the date of the 1924 act, but was in excess of the tax imposed by the 1924 act as amended, *with deduction for State tax*, was an excess payment within contemplation of section 325 of the act of 1926, and interest thereon is therefore specifically barred by said section.

*The Reporter's* statement of the case:

*Mr. Russell L. Bradford* for the plaintiff. *Taylor, Blanc, Capron & Marsh* and *Mr. George H. Craven* were on the brief.

*Mr. John A. Rees*, with whom was *Mr. Assistant Attorney General Frank J. Wideman*, for the defendant.

The petition filed herein sought to recover $421,645.93 with interest, estate tax alleged to have been overpaid on June 8, 1925. The Commissioner of Internal Revenue had audited the estate tax return subsequent to the enactment of the Revenue Act of 1926 and had determined an overassessment in the amount above stated. He had issued a certificate of overassessment in which he held that the overassessment was barred by the statute of limitation for the reason, as he concluded, that the estate had not filed a timely claim for refund. The question of the bar of the statute is no longer in the case for the reason that the parties properly agree that the refund claim filed was timely and sufficient. As will be disclosed in the findings, the correct overpayment made by the estate was $321,933.63 and the only point of difference between the parties is whether plaintiff is entitled to interest on this overpayment in view of the provisions of section 325 of the Revenue Act of 1926.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

**1.** E. Pennington Pearson, plaintiff herein, is the sole surviving administrator of the estate of Frederick F. Ayer, who died intestate on June 9, 1924, a resident of New York City.

**2.** December 6, 1924, the original administrators paid to the State of New York $475,000 as inheritance tax on property included in the decedent's estate and thereafter further amounts, not here directly involved.

**3.** June 8, 1925, the then administrators of the Ayer estate filed their Federal estate tax return showing a gross estate of $10,463,973.68, a net estate of $9,457,009.68 subject to tax, and a Federal estate tax thereon of $2,370,953.38. Pur-

suant to the provisions of section 301 (b) of the Revenue Act of 1924, a credit was claimed on account of estate and inheritance tax paid to the State of New York of $592,-738.32, representing 25 percent of the total tax so reported and leaving a net balance of tax due of $1,778,215.06, which was paid June 8, 1925. The estate tax so reported was computed and paid under the provisions of title III of the Revenue Act of 1924.

**4.** The Bureau of Internal Revenue proceeded to audit the return and, the administrators having been advised of the audit, their attorney, fully authorized thereunto, wrote to the Deputy Commissioner of Internal Revenue March 28, 1928, making no objections to the audit, but stating that the estate was not yet in a position to prove the credits of State taxes, for the reason that the amount of the New York State tax had not yet been finally determined, and asking for a conference.

The Deputy Commissioner replied April 3, 1928, that the credit for State inheritance tax would not affect the audit since it related only to the method of payment.

The Commissioner completed the audit and found the correct gross estate to be $11,416,202.60, the net estate subject to tax $10,509,035.36, and the estate tax $1,808,758.84. The foregoing tax as determined by the Commissioner was computed under title III of the Revenue Act of 1926. Since as shown in finding 3, $1,778,215.06 had been paid at the time the return was filed, there was shown an amount yet due from plaintiff of $30,543.78, and notification thereof was given by the Commissioner to the administrators by letter of April 14, 1928. In his determination the Commissioner did not allow any of the amount claimed as a credit in the original return under the provisions of section 301 (b) of the Revenue Act of 1924, the letter stating that "No credit is allowed on account of payment of estate and inheritance tax, since the evidence required by article 9 (a) of Regulations 70 has not been furnished."

**5.** Conferences ensued between plaintiff's and defendant's representatives wherein it was urged in behalf of plaintiff that since there was a credit due on account of the New

York State tax more than compensating for the unpaid tax of $30,543.78, collection of the unpaid tax should be deferred.

A warrant of distraint nevertheless issued, and plaintiff on March 1, 1929, paid the additional tax of $30,543.78, with interest of $13,591.98, a total of $44,135.76, and in letter transmitting the administrator's check therefor his attorney, fully authorized thereunto, stated to the collector as follows:

> This payment is made under protest, as it is the claim of the estate that it is entitled to a refund upon the inheritance tax already paid in a sum in excess of $450,000.

**6.** June 5, 1929, plaintiff filed with the Collector of Internal Revenue formal claim for refund of $452,189.68, with interest, being 25% of the Federal tax of $1,808,758.84, theretofore determined, with statement therein as follows:

> This estate paid the inheritance tax as shown by the return filed of $1,778,215.06 on or about June 8th, 1925; subsequently it paid an additional assessment of $30,543.78; a total inheritance tax paid the Treasury Department of $1,808,758.84. The estate paid to the State of New York as inheritance tax on or about December 8, 1924, the sum of $475,000.00.
>
> A refund of $452,189.68, being twenty-five (25) percent of the Federal inheritance tax paid, is, therefore, due this estate with interest thereon, being an amount less than the inheritance tax paid the State of New York.
>
> Refund is also asked for interest paid on the assessment of $30,543.78 paid as aforesaid. All necessary additional proofs will be supplied later.

**7.** The claim for refund was rejected by the Commissioner May 1, 1931, without consideration as to its merits, on the ground that it was filed July 3, 1929, more than four years after payment of the tax June 8, 1925, and therefore, under section 3228, Revised Statutes, not allowable. Assignment of July 3, 1929, as the date of filing the refund claim was based on information from the Collector's office, given under a mistaken belief that the claim had not been filed until that date.

May 9, 1931, plaintiff protested the action of the Commissioner, declaring that a formal claim for refund had been seasonably filed June 5, 1929, that plaintiff had been claiming a refund before that time, and that the office of the Commissioner had been fully advised of this situation long before the statute of limitations had begun to run.

**8.** Proof of payment of an inheritance tax of $475,000 to the State of New York December 6, 1924, was filed by plaintiff with the Commissioner May 14, 1931. The New York State inheritance tax was finally determined June 17, 1931, the amount thereof being $517,592.24, and proof thereof was filed by plaintiff with the Commissioner July 29, 1931.

**9.** Thereafter, some time before December 22, 1931, the Commissioner of Internal Revenue issued and plaintiff received Certificate of Overassessment No. 735—3d N. Y., without date, indicating a correct gross tax of $1,808,758.84, a credit for State inheritance tax of $452,189.71, and a correct net tax of $1,356,569.13, an overassessment of $465,781.69, $421,645.93 thereof barred by the statute of limitations, and an allowable amount of $44,135.76, with interest of $7,296.91, total of $51,432.67, Treasury check for which was thereafter accepted by plaintiff under protest.

**10.** During the hearing in this proceeding it developed that assets to the extent of $531,798.96 had been omitted from the gross estate in the prior determinations with the result that instead of the gross estate as previously determined by the Commissioner of $11,416,202.60 the correct gross estate was $11,948,001.56. The parties are now agreed that there is an overpayment of $321,933.63 on the basis of the tax computed as provided in title III of the Revenue Act of 1926 as follows:

| | | |
|---|---|---|
| Gross estate | $11, 948, 001. 56 | |
| Deductions | 907, 167. 24 | |
| Net estate | 11, 040, 834. 32 | |
| Gross tax | 1, 941, 708. 58 | |
| Credit for State estate, inheritance, legacy, or succession taxes | 485, 427. 15 | |
| Net tax due | | $1, 456, 281. 43 |

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| | | |
|---|---|---|
| Tax paid June 8, 1925 | $1,778,215.06 | |
| Tax paid March 1, 1929 | 30,543.78 | |
| Interest paid March 1, 1929 | 13,591.98 | |
| Total paid | 1,822,350.82 | |
| Refunded December 2, 1931 | 44,135.76 | |
| Net tax paid | | $1,778,215.06 |
| Excess payment | | 321,933.63 |

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The only question in this case is whether section 325 of the Revenue Act of 1926 is applicable to the overpayment of $321,933.63 in respect of tax paid by the estate of Frederick F. Ayer. That section provides as follows: "Any tax that has been paid under the provisions of Title III of the Revenue Act of 1924 prior to the enactment of this Act in excess of the tax imposed by such title as amended by this Act shall be refunded without interest."

June 8, 1925, the estate of Ayer filed a return showing an estate tax of $2,370,953.38 computed in accordance with the provisions of the Revenue Act of 1924, against which tax a credit of $592,738.32, on account of estate and inheritance taxes paid to the State of New York, was claimed as provided in the 1924 Act. The difference of $1,778,215.06 between the tax shown on the return and the credit mentioned was paid June 8, 1925. The Commissioner audited the return after the enactment of the Revenue Act of 1926 and determined an estate tax of $1,808,758.54 computed in accordance with the provisions of the Revenue Act of 1926. In this determination the Commissioner, not being satisfied with the proof as to payment of the New York inheritance tax, did not allow the claimed credit therefor. After some controversy the difference of $30,553.78 between the tax determined by the Commissioner and that previously paid by the estate was paid on March 1, 1929, with interest of $13,-491.98, or a total additional payment of $44,135.76. In 1931 the estate submitted to the Commissioner satisfactory proof as to the payment of the New York inheritance tax

and during that year the Commissioner determined an estate tax liability of $1,356,569.13, which determination was likewise made pursuant to the Revenue Act of 1926. The computation resulting in this tax liability differed from the previous determination of the Commissioner only in that a credit of $452,189.71 was allowed for New York inheritance tax to the extent of 25 percent of the gross Federal estate tax determined. In other words, a gross Federal tax of $1,808,758.84 was computed pursuant to the Revenue Act of 1926, a credit of $452,189.71 was allowed, and a net Federal estate tax liability of $1,356,569.13 was determined. Inasmuch as $1,822,350.82 had previously been paid, there was shown an overpayment of $465,781.69. As a result of this determination the Commisnioner refunded the additional payment of tax and interest of $44,135.76 which had been made March 1, 1929, but refused to refund the balance of $421,645.93 on the ground that it was barred by the statute of limitation. It is now agreed that the Commissioner was in error in holding that the refund of the overpayment was barred. However, in the presentation of proof in this proceeding, it appeared that certain assets had been omitted from the gross estate in the original return filed by the estate and by the Commissioner in his determinations. As a result of the inclusion of these additional assets the parties now agree that the correct overpayment is $321,933.63 and that plaintiff is entitled to judgment for that amount. This leaves for consideration only the question whether, in view of the provisions of section 325 of the Revenue Act of 1926 hereinbefore quoted, plaintiff is entitled to interest on this overpayment from the date of payment on June 8, 1925.

We think it is clear from the facts recited above that section 325 is applicable to the overpayment, and accordingly no interest may be allowed. The tax paid by the estate prior to the enactment of the Revenue Act of 1926 was $1,778,215.06 exclusive of the additional payment made in 1929 after the passage of the Revenue Act of 1926, which has been refunded, and therefore must be disregarded in this case. The amount of $1,778,215.06 was computed and paid under the provisions of Title III of the Revenue Act of 1924. The excess payment of $321,933.63, which is now to be refunded, is the difference between the above-men-

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tioned amount of $1,778,215.06 and the correct estate tax liability as computed under Title III of the Revenue Act of 1926. This difference and more is accounted for by the fact that the rates prescribed by the Revenue Act of 1926 were used in the final computation, whereas the rates prescribed by the Revenue Act of 1924 were used in the computation of tax originally paid by the estate. While it is true that the Commissioner in his first determination did not allow any credit for New York inheritance tax, that a claim for refund was filed on the ground that such credit should be allowed, and that the overpayment was determined by the Commissioner after allowing the claimed credit, these facts do not make section 325 inapplicable. The Revenue Act of 1924 provided for the credit, and its allowance by the Commissioner was postponed merely because he was not satisfied with the proof submitted by the estate as to the payment thereof. When satisfactory proof had been furnished, the Commissioner allowed the proper credit resulting in the overpayment computed under Title III of the Revenue Act of 1926. A computation of the correct tax at the rates prescribed by the Revenue Act of 1924 and the allowance of the credit would not have produced an overpayment. The computation of the tax in the original return pursuant to the 1924 Act and the allowance of the credit, which was taken against the tax computed at those rates, produced the amount of tax which the estate paid and as a result of the omission of certain assets the correct net estate was greater than that shown in the return. From this it is clear that had the tax been computed under the Revenue Act of 1924 rather than the Act of 1926 a deficiency in tax rather than an overpayment would have resulted. In these circumstances it is clear, we think, that section 325 is applicable to the overpayment of $321,933.63 and that the allowance of interest thereon is specifically prohibited. Cf. *Sunny Brook Distillery Co.* v. *United States*, 72 C. Cls. 157.

Judgment accordingly will be entered in favor of plaintiff for $321,933.63 without interest. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

OPINION ON PLAINTIFF'S SECOND MOTION FOR NEW TRIAL AND ADDITIONAL FINDINGS OF FACT

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff has filed a second motion for a new trial and additional findings of fact.

In the last sentence of finding 10 of the findings of fact promulgated by the court June 1, 1936, the amount "$485,327.15" stated therein is changed to read $485,427.15. This was a typographical error and does not change the amount of the tax involved nor the result reached in the opinion.

The motion for further amendments of facts is denied. Plaintiff's original argument and its argument in the first and second motion for a new trial are based, we think, upon the erroneous premise that section 325 of the Revenue Act of 1926, and, particularly, the words "tax imposed" relate only to a mathematical computation under the provisions of section 301 (a) of the Revenue Act of 1924 as retroactively amended by section 322 of the Revenue Act of 1926. In other words, plaintiff argued originally and still argues that the statutory credits, particularly the credit allowed by the statute for New York state inheritance taxes, which give rise to the controversy in this case, should be excluded from a computation of the "tax imposed" by the retroactive provisions of the Revenue Act of 1926. The express language of section 325 of the Revenue Act of 1926 specifies that the difference between the tax paid before "February 26, 1926" under Title III of the Revenue Act of 1924 and the tax computed under that *same title*, as retroactively amended by the Revenue Act of 1926, which reduces the rates of tax, should be refunded without interest. This section, 325 of the Revenue Act of 1926, simply means, we think, that any sum paid as estate taxes to the United States under Title III of the Revenue Act of 1924 before February 26, 1926, the date of the enactment of the Revenue Act of 1926, in excess of the tax imposed under the same provisions after they had been retroactively amended, so as to provide lower rates and less tax, should be refunded without interest. The credit provisions of section 301 (b) are an inseparable part of Title III and must be considered in any computation of the "tax imposed" in determining

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the amount to be refunded without interest by reason of the reduction in rates. We cannot, therefore, concur in plaintiff's argument that the words "tax imposed" relate only to a computation under section 301 (a) of the Revenue Act of 1924 as amended without regard to subdivision (b) and that the credits allowed under subdivision (b) have nothing to do with the amount of tax imposed by the statute but relate only to the method of payment. Compare *Morsman* v. *Commissioner of Internal Revenue*, 13 B. T. A. 415.

The net tax paid under the Revenue Act of 1924 before the enactment of the Revenue Act of 1926 in the sum of $1,778,215.06 was the tax paid under Title III of the Revenue Act of 1924 prior to amendment. The tax exacted by the same title after its amendment by the Revenue Act of 1926 was $1,456,281.43. The admitted difference was $321,933.63, which, it seems clear to us, was required to be refunded in accordance with the judgment heretofore entered without interest. The second motion for a new trial is therefore overruled.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## MICHAEL STANDERSON v. THE UNITED STATES

[No. 42923. Decided June 1, 1936. Judgment November 9, 1936[1]]

*On the Proofs*

*Pay and allowances of Army band leader, retired; difference in pay; provisions of act of March 2, 1907, mandatory.*—The provisions of the act of March 2, 1907, for retirement, upon application, of enlisted men in the Army, Navy, and Marine Corps after 30 years' service are mandatory; and where the plaintiff, after 30 years' enlisted service, and shortly after due and legal promotion from band sergeant to band leader, had his application for retirement as band leader disallowed, his promotion to that grade revoked, and retirement granted him as of his former grade of band sergeant, he is, nevertheless, entitled to the retired pay and allowances of band leader, in which grade he was serving and receiving pay at the time of his application for retirement.

[1] *Post*, p. 702.

*The Reporter's* statement of the case:

*Mr. Mahlon C. Masterson* for the plaintiff. *Mr. Samuel T. Ansell* was on the brief.

*Mr. Louis R. Mehlinger*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

**1.** Plaintiff enlisted in the United States Army on December 16, 1898, and served more than 30 years (including allowance for double time for service in the Philippine Islands and Alaska) under various enlistments as follows: 20th Infantry Band from December 16, 1898, to December 15, 1901; 11th Infantry Band from March 15, 1902, to March 14, 1908; Company K, 7th Infantry, from March 15, 1908, to March 18, 1911; 16th Infantry Band from March 31, 1911, to March 30, 1914; 4th Band, Coast Artillery Corps, from March 31, 1914, to date of retirement, July 14, 1919.

**2.** On October 19, 1918, plaintiff was appointed band sergeant and on May 21, 1919, he was appointed band leader.

**3.** On May 29, 1919, plaintiff submitted an application to the Adjutant General of the Army for retirement as band leader, and the same was forwarded, on the same day, to the Adjutant General by the Commanding Officer, Headquarters, Coast Defenses of Chesapeake Bay, Fort Monroe, Virginia. Before action was taken on his application, the Adjutant General returned the application with the second indorsement dated June 16, 1919, as follows:

> To the Commanding Officer, Coast Defenses of Chesapeake Bay, Fort Monroe, Va., for remark regarding the promotion of this soldier to the grade of Band Leader. The records of this office show that Michael Standerson was present on Apl. 30, 1919, as Band Sergeant. In no case will an enlisted man be promoted to a rank that he is not competent to hold on the active list for the purpose of giving him increased pay on the retired list. Attention is invited to the fact that he is now serving in the seventh enlistment period.

By fourth indorsement dated June 21, 1919, the Commanding Officer, 4th Band, Coast Artillery Corps, Fort

Monroe, Virginia, advised the Commanding Officer, Coast Defenses of Chesapeake Bay, as follows:

> 1. Returned. Michael Standerson was recommended for promotion to the grade of Band Leader by Major Robert M. Perkins, C. A., who was then Adjutant and given warrant 20 May 1919. It was his opinion that Standerson was fully competent to be a Band Leader on the active list, and recommended him so that he would have such rank if called into active service.
> 2. It is my opinion that he is competent to be a Band Leader and that he will serve the country as an organizer and leader of a band efficiently, whenever called into active service.

By fifth indorsement of same date the Commanding Officer, Coast Defenses of Chesapeake Bay, advised the Adjutant General as follows:

> 1. Returned, inviting attention to preceding indorsement. Upon investigation it was found that Standerson was given several offers to go with other bands, as band leader, but due to the short period of time he had to serve before retiring, he declined these offers.
> 2. If it does not appear proper, on the ground of him being competent under the present circumstances, it is requested that this paper be returned so that the order may be revoked.

By sixth indorsement, dated June 27, 1919, the Adjutant General, by order of the Secretary of War, returned plaintiff's application for retirement to the Commanding Officer, Headquarters, Coast Defenses of Chesapeake Bay, Fort Monroe, Virginia, for revocation of the order promoting plaintiff to band leader. Accordingly, the warrant appointing plaintiff band leader was revoked by paragraph 7 of Special Orders No. 169, July 2, 1919, Headquarters, Coast Defenses of Chesapeake Bay, Fort Monroe, Virginia, as follows:

> 7. So much of Warrant # 1221, issued from these Headquarters 21-May 1919, appointing Band Sergeant Michael Standerson, #614073, 4th Band, C. A. C., Band Leader, is revoked effective 21-May 1919. By order of Colonel Greig: Guy B. Foster, Captain, C. A., Personnel Adjt.

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4. Plaintiff's original application for retirement as band leader was thereafter accordingly changed to show application for retirement as band sergeant. Plaintiff was then placed on the retired list in accordance with his application as so changed pursuant to paragraph 5, Special Orders No. 158-E, War Department, July 9, 1919, as follows:

> 5. Band Sergeant Michael Standerson, 4th Band, C. A. C., will be placed upon the retired list at Fort Monroe, Va., and will proceed to his home. The Quartermaster Corps will furnish the necessary transportation and pay the soldier commutation of rations in advance for the necessary number of days' travel, it being impracticable for him to carry rations of any kind. The journey is necessary for the public service.

5. Plaintiff was paid as band leader from May 21, 1919, to June 30, 1919. He was paid the pay of a band sergeant from July 1, 1919, until the date of his retirement, and in final settlement of his accounts on retirement there was deducted from his pay the difference between the pay of a band leader and that of a band sergeant from May 21, 1919, to June 30, 1919. Since retirement he has received the retired pay of a band sergeant.

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit to recover the difference between the retired pay and allowances authorized for a band leader and the retired pay and allowances received by him as a retired band sergeant from February 1, 1929, to date of judgment.

The plaintiff enlisted in the United States Army on December 16, 1898, and, after serving as an enlisted man in various Infantry Regiments and bands, he was appointed band sergeant on October 19, 1918, and band leader of the Fourth Coast Artillery Band on May 21, 1919. After his appointment as band leader and after serving more than thirty years as an enlisted man, he applied to the President for retirement. At the time of his application for retirement he was receiving and did receive the pay of a band leader. When his application was received by the

Adjutant General it was returned to the Commanding Officer on the ground that plaintiff was not competent to hold a position as band leader. The Commanding officer reported that plaintiff was competent to perform the duties of a band leader and because of his competency he was promoted to that rank.

On June 27, 1919, the Adjutant General by order of the Secretary of War returned plaintiff's application for retirement recommending revocation of the order promoting him to band leader, and on July 2, 1919, the warrant appointing plaintiff band leader was revoked retroactive to May 21, 1919. Subsequently plaintiff's application for retirement as band leader was changed by the War Department to show application for retirement as band sergeant and on July 9, 1919, plaintiff was placed on the retired list as a band sergeant.

This claim is made under the provisions of the act of March 2, 1907, 34 Stat. 1217, which reads as follows:

> That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed on the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: * * *.

It is admitted that the plaintiff was an enlisted man and had served thirty years and that at the time he made application to the President he was duly and legally appointed band leader and was paid the compensation provided by statute for a band leader from May 21 to June 30, 1919. Plaintiff's application was made on May 29, 1919, and therefore was within the period when he was performing the duties of a band leader and receiving the compensation of a band leader.

This court had occasion to consider the same act in a recent case which is basically similar to the present case. In *Blackett* v. *United States*, No. 42047, decided November 4, 1935 (81 C. Cls. 884), we held:

> The act gives no discretion to the President. If no discretion is placed by Congress in the Commander-in-Chief of the Army and Navy, certainly none can be

> read into the act for any subordinate officer. * * * The fact that the enlisted man has served for so long a period in the Army was considered sufficient by Congress to give him a right to retire in the grade in which he was then serving. * * * The right granted by Congress was without condition and absolute. No rule or regulation of the Department could circumscribe or impair it, and any action which placed conditions on retirement or attempted to select the grade in which retirement was granted, was without warrant of law. * * * The enlisted man applied to be retired when he was a master sergeant and the Department gave consent for the retirement as a private. The law fixed the grade upon which he should retire. It gave no authority to anyone for any cause whatsoever to designate the grade after application had been made to the President. Compensation during retirement followed the grade. No official approval was necessary.
>
> The words of the act are plain, and their meaning simple. The act imposed an imperative duty and not a discretionary power. The Department has read into the act discretionary powers and has assumed the right to permit retirement and to select the grade in which retirement is permitted. The act confers no such powers on the President. A reasonable time to ascertain the duration of service is allowable. Four months' delving into the character and past conduct of the applicant is unreasonable when the length of service was known and admitted. The order of December 16, 1926, permitting him to retire had the effect of retiring him and the grade in which he was entitled to be retired was that in which he was serving when the application was made. *Cloud* v. *United States*, 43 C. Cls. 69; *Medbury* v. *United States*, 173 U. S. 497. The facts show a capricious and arbitrary assumption of powers by officers of the War Department over an enlisted man which has no basis in law.

As held in the *Blackett case* neither the President nor any subordinate officer of the War Department has the right to select the grade in which retirement is permitted. The law which grants plaintiff the right to retire also fixes the retirement compensation as three-fourths of the pay and allowances he is receiving at the time of his application for retirement to the President.

The plaintiff is entitled to recover. Judgment will be suspended to await the coming in of a report from the

General Accounting Office showing the amount due the plaintiff for the period from February 1, 1929, to the date of judgment. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## THE ROCKFORD PAPER MILLS v. THE UNITED STATES

[No. L-204. Decided November 9, 1936]

*On the Proofs*

*Income tax; interest on overpayment; when statute becomes effective.*—An act of Congress becoming effective upon its approval by the President takes effect at the precise time of his approval; and where an allowance of interest on an overpayment of income tax was made by the Commissioner of Internal Revenue on the day of the President's approval of the Revenue Act of 1924, but prior to the precise time of such approval, it was properly made by the Commissioner under the Revenue Act of 1921, still remaining in effect.

*Same.*—The rule applied by courts in some cases that a statute made effective upon its enactment is operative in point of time as to all acts and events occurring at any time on the day of its enactment, does not apply in cases where the exact time that the statute went into effect is shown.

*Determination of Commissioner of Internal Revenue prima facie correct; burden of proof.*—It is a familiar rule that the determination of the Commissioner of Internal Revenue is *prima facie* correct; and the burden of proof to show the contrary is not shifted from the taxpayer to the Government by reason of the Government's failure to possess evidence of the time of certain action by it material to the determination of the question in controversy.

*The Reporter's* statement of the case:

*Mr. Allen H. Gardner* for the plaintiff. *Morris, KixMiller & Baar* were on the briefs.

*Mr. John A. Rees*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

Plaintiff is, and at all times hereinafter mentioned was, an Illinois corporation with its principal office at Rockford.

April 1, 1918, plaintiff filed its income and excess profits tax returns for the calendar year 1917 disclosing a tax liability of $42,234.27, which was paid June 15, 1918. The Commissioner of Internal Revenue made an additional assessment on his January 1919 assessment list for the same year, of $292.25, which was paid by plaintiff September 12, 1919.

Subsequently the Commissioner determined an overassessment of $14,462.32 for 1917, and on April 7, 1924, approved a schedule of overassessments which included the foregoing overassessment in favor of plaintiff. The schedule of overassessments was duly transmitted to the appropriate collector for his action in accordance with the directions appearing thereon and the schedule, after the directions had been complied with by the collector, was on May 5, 1924, signed and returned to the Commissioner together with a schedule of refunds and credits on which appeared a refund in favor of plaintiff for 1917 in the amount of the above overassessment.

June 2, 1924, the Commissioner signed the schedule of refunds and credits authorizing the disbursing clerk of the Treasury Department to issue checks for the amounts found by the Commissioner to be refundable to the several taxpayers whose names appeared thereon, including that refundable to plaintiff for 1917.

The Revenue Act of 1924 was approved by the President at 4:01 p. m., June 2, 1924, the same day on which the schedule of refunds and credits was signed. No record was kept in the Bureau of Internal Revenue of the time of day when such schedules were signed, and it is accordingly impossible to determine with certainty whether the particular schedule involved in this suit was signed before or after 4:01 p. m., June 2, 1924. The general practice, however, was to sign such schedules prior to that time of day and in most cases they were not signed after that time.

July 3, 1924, a refund check for $14,462.32, together with a certificate of overassessment for 1917 in that amount, was

mailed to plaintiff by the collector. Subsequently the Commissioner computed and allowed interest of $191.71 on the overpayment under section 1324 (a) of the Revenue Act of 1921. No further interest allowance has been made.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit begun to recover interest claimed to be due on an overassessment in addition to the sum allowed and paid plaintiff by the Commissioner of Internal Revenue.

It is conceded that the sum allowed and paid was correct if the allowance of interest was governed by the revenue act of 1921 in accordance with which the Commissioner acted, but it is contended by the plaintiff that interest should have been computed under the provisions of section 1019 of the revenue act of 1924, and this issue turns on the determination of the question of whether the schedule of refunds and credits which fixed the amount of interest was signed by the Commissioner of Internal Revenue before or after 4:01 p. m. on June 2, 1924. The revenue act of 1924 was approved at 4:01 p. m. on June 2nd of that year, and attention is called to the rule applied in some cases that a statute made effective upon enactment is operative in point of time as to all acts and events occurring at any time on the day of enactment, and many cases are cited where this rule has been applied. We need not consider these cases for the reason that in the case of *Bristol Mfg. Corp.* v. *United States*, 77 C. Cls. 182, 190, we held that this rule did not apply in cases where the exact time was shown when a legislative act went into force.

The testimony with reference to the time when the Commissioner signed the schedule of refunds and credits is general, vague, and indefinite. It is not possible from the evidence to fix with certainty the hour when the schedule was signed. On the other hand, the surrounding circumstances are such there is a strong probability that the signature of the Commissioner was affixed to the schedule prior to 4:01

p. m. There are some authorities that hold in effect that the weight of the probabilities may be sufficient to establish a preponderance of the evidence, but we think it is not necessary to so hold in this case.

It is a familiar rule that the determination of the Commissioner of Internal Revenue is *prima facie* correct. *Johnson Motor Co.* v. *United States*, 79 C. Cls. 151, 159. It could be correct, however, in this case only in the event the Commissioner signed the schedule before the act of 1924 went into effect. We think the fact that he made the allowance of interest under the 1921 act was presumptive evidence that he acted before it expired. In *Stearns Co.* v. *United States*, 291 U. S. 54, 63, it is said:

> Acts done by a public officer "which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." [Citing a number of cases together with Wigmore on Evidence, Vol. 5, Sec. 2524.]

This presumption, of course, could be rebutted by any evidence however slight, but, as stated above, the surrounding circumstances, if they have any probative force, tend to show that the Commissioner's action was prior to the hour when the 1924 act went into effect. We think the presumption was in favor of the Commissioner's action, and if we are correct in this it is clear that the evidence does not rebut this presumption and plaintiff's case must fail.

It is suggested that as the defendant could have kept a record which would have shown definitely the time when the schedule was signed, its failure so to do casts upon it the burden of proof. This contention is based on the rule that where it appears that one party to a cause of action is in possession of evidence which would determine a disputed fact in the case and fails to produce it, a presumption arises against him upon that fact. In the instant case the defendant had in its possession no evidence beyond that which was given on the trial with reference to the disputed fact and we do not think the rule is ever carried so far as to make the nonexistence of evidence in relation to a matter ordinarily

immaterial raise a presumption which would change the burden of proof.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

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## JOSEPH HUBER v. THE UNITED STATES

[No. M–103. Decided November 9, 1936]

*On the Proofs*

*Income tax; deduction by tenant for life for depreciation of properties of life estate used in trade or business.*—The owner of a life estate in buildings used by him as rental properties is entitled under the Revenue Acts of 1921 and 1924 to deduction from the income therefrom for depreciation of the properties.

*The Reporter's* statement of the case:

*Mr. Frank S. Bright* for the plaintiff. *Mr. H. Stanley Hinrichs* was on the briefs.

*Mr. Joseph H. Sheppard*, with whom with *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

**1.** Emilie Huber, the mother of plaintiff, died August 28, 1914, leaving a will in which plaintiff was named executor. Her will contained among other things the following provisions:

> I give and devise to my son, Joseph Huber, any and all real property or interest therein I may own at the time of my death to have and to hold the same for his own use and benefit for the term of his natural life and to receive the rent, income, and profit thereof to his own use and benefit, and upon his death I give and devise the said real property to my four children, Max Huber, Charles Huber, Emilie Obernier, and Francisca Seidenberg, share and share alike, * * *.

**2.** The real property devised to the plaintiff for life by his mother consisted of about forty buildings, of which the lower floors were used for stores and the floors above for living quarters.

**3.** Charles Huber, a brother of plaintiff, died January 14, 1918, leaving a will in which the plaintiff was named residuary devisee of certain properties, including the interest of remainderman of Charles Huber under the will of Emilie Huber.

**4.** February 27, 1923, plaintiff filed his income-tax return for the year 1922, which disclosed a net income of $229,867.31 and a tax liability of $101,515.40. The tax was paid as follows:

| | |
|---|---|
| March 1, 1923 | $20, 204. 89 |
| September 13, 1923 | 26, 323. 57 |
| December 13, 1923 | 24, 000. 00 |
| December 21, 1923 | 5, 173. 96 |
| April 29, 1924 | 25, 812. 98 |
| Total | 101, 515. 40 |

April 23, 1927, an additional assessment was made against the plaintiff by the Commissioner of Internal Revenue for 1922 in amount of $5,011.19, together with interest thereon of $1,121.58, aggregating $6,132.77, which was paid by plaintiff May 4, 1927.

Subsequently a certificate of overassessment was issued to plaintiff for the year 1922 in the sum of $535.74, with interest thereon of $33.38, aggregating $569.12, which amount was refunded to plaintiff and received by him on July 18, 1928.

**5.** March 15, 1924, plaintiff filed his income-tax return for the year 1923, which disclosed a net income of $198,261.17 and a tax liability of $83,630.89. The tax was paid or abated as follows:

| | |
|---|---|
| March 15, 1924 | $20, 907. 73 (paid) |
| June 6, 1924 | 11, 815. 40 (paid) |
| August 11, 1924 | 20, 907. 72 (abated) |
| September 11, 1924 | 15, 000. 04 (paid) |
| December 16, 1924 | 15, 000. 00 (paid) |
| Total | 83, 630. 89 |

April 23, 1927, an additional assessment was made against the plaintiff for 1923, in amount of $5,520.67, with interest thereon of $904.37, aggregating $6,425.04, which was paid by plaintiff May 5, 1927.

**6.** March 14, 1925, plaintiff filed his income-tax return for the year 1924, which disclosed a net income of $191,883.84 and a tax liability of $59,808.66. The tax was paid as follows:

| | |
|---|---|
| March 17, 1925 | $16,118.39 |
| June 10, 1925 | 15,690.27 |
| September 11, 1925 | 14,000.00 |
| December 10, 1925 | 14,000.00 |
| Total | 59,808.66 |

June 20, 1927, plaintiff filed an amended income-tax return for the year 1924, disclosing a net income of $198,408.84 and a tax liability thereon of $62,614.41. The additional tax thus disclosed was duly assessed, together with interest thereon in amount of $272.13, aggregating $3,077.88, which was paid by plaintiff July 8, 1927.

March 9, 1929, an additional assessment was made against plaintiff for 1924, in amount of $64.05, together with interest of $13.84, aggregating $77.89, which amount was satisfied by credit March 29, 1929.

**7.** For the years 1922, 1923, and 1924, plaintiff, as executor of the estate of Emilie Huber, filed fiduciary returns covering the income of the estate for these years, and he also filed individual returns referred to in findings 4, 5, and 6 herein covering his incomes during those years, but he did not claim in any of these returns any deductions on account of depreciation of any of the real property passing under the will of Emilie Huber, in all of which he had a life interest, and in which he also had an undivided one-fourth interest as remainderman under the will of his brother, Charles Huber. Likewise the Commissioner has made no allowance of a deduction on account of such depreciation.

**8.** December 6, 1928, the plaintiff filed claims for refund for the years 1922 and 1923 in the respective amounts of $7,659.56 and $5,612.32, and on March 9, 1929, filed a claim for refund for the year 1924 in amount of $4,658.48.

In the aforesaid claims the plaintiff contended that in computing his tax liability for the years 1922, 1923, and 1924 he was entitled to a deduction from gross income for depreciation of the property held by him as a legal life tenant, and in which property the plaintiff owned an undivided one-fourth interest in the remainder.

**9.** The Commissioner rejected the claims for refund for 1922 and 1923 on March 22, 1929, and the claim for refund for 1924 on December 13, 1929.

**10.** During the years 1922, 1923, and 1924, the plaintiff managed and looked after all repairs of the real properties devised to him by his mother, rented them, and collected the rents. Depreciation was sustained on these properties through their use by plaintiff in his business, and the correct apportionment thereof on account of plaintiff's interest (including that in which plaintiff had a life interest as well as that held by him in fee simple) was $11,125.72 for each of the years 1922 and 1923, and $10,236.38 for 1924.

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff seeks in this suit to have depreciation allowed on some forty buildings in which he holds a life interest. These properties were devised to plaintiff for life under his mother's will. He is in possession and enjoyment of them. Prior to taxable years involved one of the remaindermen died leaving his interest in these properties to plaintiff. He therefore held one-fourth interest in fee simple and a life interest in the remaining three-fourths interest. The properties were subject to wear and tear and exhaustion. They were used by plaintiff in his trade or business during the years in question. He managed them, kept them in repair, collected the rents, and returned the revenue received from them as income under the revenue laws.

Plaintiff duly filed individual income-tax returns and also returns for his mother's estate of which he was executor. Although no claim for deductions on account of depreciation sustained on these properties was made in these returns, nevertheless, plaintiff later filed timely claims for refund in

which he contended he was entitled to deduction from gross income for depreciation sustained not only on the part in which he possessed the fee simple but also on the part of the property in which he had an estate for life.

There is no dispute that plaintiff is entitled to deductions claimed on the interest he had in fee simple. The defendant concedes this right. There remains only the question as to whether a life tenant is entitled to a deduction for depreciation sustained on properties used by him in his trade or business. The applicable section of the revenue acts of 1921 and 1924 is 214 (a) (8), which provides:

> (8) a reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

We can find nothing in these words of this section to indicate that the property must be held in an absolute estate in order to permit the allowance. The plaintiff had the possession and enjoyment of a freehold estate and that estate was suffering a gradual exhaustion; through such exhaustion the income which was being returned for income-tax purposes was gradually diminishing. This slow exhaustion was due to wear and tear and was not caused by a shrinkage in the value of the estate due to efflux of years.

In the case of *Grant* v. *Rose*, 39 Fed. (2d) 338, 339, the circuit court for the fifth circuit in a similar case involving the identical question held:

> The Revenue Acts of 1918 and 1921 do not limit the deduction to property held in fee simple, or attempt nice discriminations between inheritances absolute and limited or conditional, but they grant the allowance on "property used in the trade or business." Therefore, an estate for life, even if it be pur auter vie, if so used, is property within the letter and spirit of the statute and entitles the owner—that is, the holder of the legal title in possession—to the deduction.

See also *H. C. Brown* v. *Commisisoner*, 25 B. T. A. 631.

The defendant pleads Section 215 (b) of the Revenue acts of 1921 and 1924 as a further defense. We can see no merit in this contention. The plaintiff is making no claim for depletion of the land or for shrinkage in value due to the expiration of the life estate. There is a marked differ-

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ence between depreciation and depletion and shrinkage in value due to the lessening of the life estate by age.

The cases relied upon by the defendant are distinguishable on their facts from the case at bar in that each deals with a different character of interest which would make these decisions inapplicable. A leasehold is only a chattel and there is a decided difference between an equitable life tenant and a legal life tenant. We can see no good purpose to be attained in differentiating each case.

The plaintiff is entitled to the allowance for depreciation on the properties in which he has a life interest.

The parties have stipulated that in the event it is held that plaintiff is entitled to deductions for depreciation on his interest as a life tenant, as well as on his fee simple property, the amount of such deductions (including the correct apportionment of depreciation on account of the life estate, and the total depreciation sustained on the fee interest) is $11,125.72 for 1922, $11,125.72 for 1923, and $10,236.38 for 1924.

Judgment will accordingly be entered in favor of plaintiff by giving effect to those deductions, with entry of judgment suspended pending the submission of a computation by the parties on that basis. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## EDNA WARD CAPPS AND AMERICAN SECURITY AND TRUST COMPANY, EXECUTORS OF THE ESTATE OF WASHINGTON L. CAPPS, DECEASED, v. THE UNITED STATES

[No. 42590. Decided November 9, 1936]

*On the Proofs*

*Navy pay and allowances; retired rear admiral on active duty.*—Plaintiffs' decedent held entitled to active service pay and allowances of a lieutenant commander of the Navy while on active duty as a rear admiral, retired.

*The Reporter's* statement of the case:

*King & King* for the plaintiffs. *Messrs. George A. King* and *John W. Gaskins* were on the brief.

*Miss Stella Akin*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

The plaintiffs are executors of the estate of Washington L. Capps, deceased, who was appointed a cadet engineer in the United States Navy on October 1, 1880. He served on active duty as a commissioned officer until January 31, 1928, when, having reached the statutory retirement age of sixty-four years, he was placed on the retired list with the rank of rear admiral. At the time of his retirement he had to his credit forty-seven years and four months of active duty. On retirement, with his consent, he was ordered to continue on duty as senior member of the Compensation Board, and he continued to perform active duty on that Board from the date of his retirement to the date of his death on May 31, 1935. At all times involved in the case he had a dependent wife, but while serving on the Board he did not occupy government quarters and no adequate public quarters were assigned or available for him and his dependent.

From February 1, 1928, to the date of his death, the decedent received retired pay only.

If it is held that from February 1, 1928, to May 31, 1935, the decedent was entitled to active duty pay and allowances (with a dependent) of a lieutenant commander of the Navy with over thirty years' service, there was due him at the time of his death $8,538.83.

The court decided that plaintiffs were entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

There is no dispute as to the facts in the case which are set forth in the findings and no disagreement between counsel as to the law. Under the provisions of the Act of Congress of August 29, 1916, the decedent is clearly entitled to the active duty pay and allowances of a lieutenant com-

mander, and this court has so held in no less than six cases. See *Rodman* v. *United States*, 70 C. Cls. 751; *Strauss* v. *United States*, 73 C. Cls. 690; *Stickney* v. *United States*, 73 C. Cls. 697; *National Savings & Trust Co., Executor*, v. *United States*, 76 C. Cls. 268; *Dyson* v. *United States*, 76 C. Cls. 757; and *Coontz* v. *United States*, 76 C. Cls. 757. The first of these decisions was rendered over five years ago, and held that the Act of August 29, 1916, had not been repealed. Congress, although it must have been aware of the decisions of this court, has not seen fit to take any action and thereby has tacitly approved the holding. In fact, all parties interested, except the Comptroller General, seem to have approved it. There is no dispute as to the allowances to which the decedent was entitled in the way of quarters and for a dependent wife. The report of the General Accounting Office shows that the total amount due the decedent at the time of his death was $8,538.83, for which sum judgment will be rendered in favor of the plaintiffs.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

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## THE REALTY BOND & MORTGAGE COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 42891. Decided November 9, 1936]

*On the Proofs*

*Income tax; forfeited payments on capital stock not taxable income.*—Partial payments on the purchase price of capital stock of a corporation which were forfeited to the corporation by default in the payment of the balance of the purchase price of the stock constituted capital of the corporation, and not taxable income.

*The Reporter's* statement of the case:

*Mr. Samuel H. Horne* for the plaintiff. *Mr. Earl B. Breeding* was on the brief.

*Mr. John W. Blalock*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

**1.** The plaintiff is a corporation organized under the laws of the State of Delaware, with its principal office at Wilmington, Delaware.

**2.** Certain shares of plaintiff's original issue of capital stock were subscribed for under agreements whereby the respective subscribers paid a portion of the subscription price in cash and agreed to pay the balance over varying periods of time. The agreements provided that certificates for the stock should be issued upon payment in full of the subscriptions. Certain of such subscribers failed to complete their payments for said stock, and their subscriptions became delinquent prior to 1930.

**3.** At a special meeting of the Board of Directors of the plaintiff, held on April 30, 1930, it was pointed out that an assessment and call had been duly made upon all the subscribers to the preferred stock of the corporation who were in default in the payment of their respective subscriptions to such preferred stock; that proceedings had been taken under the General Corporation Law of Delaware on said delinquent subscriptions; and that no amount had been collected thereon. Thereupon the following resolution was unanimously adopted:

> WHEREAS at a meeting of this Board held on the 27th day of May 1929, a resolution was duly adopted making an assessment and call upon all the subscribers to the Preferred Stock of this corporation who were then in default in the payment of their respective subscriptions to such Preferred Stock, for the balance due thereon, and directing the Secretary to send notice to each of such stockholders of the said assessment and call, and such notice was duly mailed by the Secretary to each of the delinquent subscribers, and
>
> WHEREAS at a meeting of this Board held on the 27th day of March 1928, a resolution was duly adopted, authorizing the proper officers of the Corporation to cause the necessary proceedings to be taken under Section 22 of the General Corporation Law of Delaware, to offer the shares of stock of such delinquent Subscribers for sale as in said Section, provided and if no bidder should be had to pay the amount due on any such subscriptions to take the necessary steps provided by the said Section 22 for the forfeiture of the stock so subscribed for and unpaid and for the forfeiture

of the amount heretofore paid on such subscriptions to this Corporation, and

WHEREAS pursuant to said resolution this Company offered the shares of the following delinquent Stockholders for sale at public sale on April 12, 1929:

(Here follows a list of forty stockholders and sundry amounts of preferred stock shares, totaling 977 shares.)

and a notice of the time and place of such sale and the sum due on each share, was duly given by advertising for three (3) weeks, successively, once in each week before the sale in a newspaper, namely, "Every Evening", published in the County of New Castle, in the State of Delaware, where this corporation has its place of business, and such notice was mailed by the Treasurer of this Corporation to each of the above named delinquent subscribers at his last known post office address, said notice being sent more than twenty (20) days before sale, and

WHEREAS there were no bidders for such shares at said sale held on April 12, 1929, and this Corporation commenced an action at law in New Castle County, Delaware, against each of the above named delinquent subscribers to recover said delinquent subscriptions, said actions being docketed on the following dates:

(Here follows a list of suits docketed against each of the aforementioned stockholders on April 24, 1929.)

and,

WHEREAS more than one (1) year has expired from the date of bringing such actions of Law and no amount has been collected by any of said actions.

NOW, THEREFORE, be it resolved, that the shares of Preferred Stock subscribed for by the following named persons, upon which there are delinquent payments due this corporation, for the collection of which said suits were brought, be and are hereby forfeited to this Corporation:

(Here follows a list of the stockholders with the number of shares of forfeited preferred stock set opposite the name of each stockholder.)

and that the amounts previously paid in by said above named subscribers on said shares of Preferred Stock as shown by the books of this corporation, be and the same are hereby forfeited to this Corporation, and

RESOLVED, that the Treasurer of this Corporation is authorized to make the necessary entries in the records of this Corporation, showing that the said subscriptions

of the shareholders above named have been forfeited and that the amounts paid in on said subscriptions have been forfeited to this Corporation.

**4.** The amounts which had been paid in by these subscribers on said shares of preferred stock of the plaintiff and which were thus forfeited to the plaintiff, aggregated $28,351.89. The plaintiff corporation did not solicit reinstatement of said subscriptions, none of said subscribers requested reinstatement of their subscriptions, and none of said subscriptions was reinstated. Said amount of $28,-351.89 was credited on the books of the plaintiff to the respective stock subscription accounts and thereafter was transferred to surplus.

**5.** On March 15, 1931, the plaintiff filed its income tax return for the calendar year 1930 with the Collector of Internal Revenue of the United States for the District of Delaware, at Wilmington, Delaware. Plaintiff paid to the said Collector of Internal Revenue income taxes for the calendar year 1930 as follows:

| | |
|---|---|
| March 15, 1931 | $570.00 |
| April 13, 1931 | 51.41 |
| June 8, 1931 | 621.49 |
| September 9, 1931 | 621.49 |
| December 16, 1931 | 621.50 |
| | $2,485.89 |

**6.** On or about May 7, 1932, the plaintiff duly filed its claim for refund for 1930, alleging, in addition to other grounds, that it had erroneously included as gross income $28,351.89 in respect of forfeited subscriptions to capital stock, such transactions being of a capital nature. In a letter from the Commissioner of Internal Revenue, dated January 12, 1933, the said claim for refund was allowed as to $343.15, based on grounds other than those now in issue, and was rejected as to $2,142.74.

The court decided that plaintiff was entitled to recover.

WILLIAMS, Judge, delivered the opinion of the court:

The plaintiff, a Delaware corporation, seeks to recover an alleged overpayment of income taxes for the year 1930, in

the sum of $2,142.74, with interest. The facts disclose that during the year 1930 subscribers to plaintiff's capital stock, who in previous years had made payments on their subscriptions amounting to $28,351.89, defaulted in meeting remaining payments due; that upon such default the subscription agreements upon which delinquent payments were due, together with the amounts previously paid on such agreements, $28,351.89, were declared forfeited to the plaintiff, and that subsequently, on a date not shown, such amounts, credited on the books of the plaintiff to the respective subscription accounts, were transferred to surplus. The plaintiff in its tax return for the year 1930 included the amount of these payments in gross income and paid the amount of the taxes due thereon.

The sole question presented is whether the amount of these payments constitutes taxable income to plaintiff for the year involved.

The question was considered by the Board of Tax Appeals in an early case, *Illinois Rural Credit Association*, 3 B. T. A. 1178. In that case partial payments had been made by subscribers to the capital stock of the taxpayer, which payments were subsequently forfeited to the taxpayer because of default by subscribers in making payment of balances due on such subscriptions. In speaking of such payments, the Board said:

> The payments on account of the stock subscriptions, at the time they were made, were undoubtedly capital payments, being made to provide capital for the corporation, and were in its hands capital receipts as distinguished from income. The fact that payments were made in installments and stock was never issued for such payments, because they were not made to the full amount of the subscriptions, does not alter their character.

This ruling was approved by the Board in the subsequent case of *Industrial Loan & Investment Co.*, 17 B. T. A. 1328, where a similar state of facts was presented. This holding was likewise approved and followed by the Board in the case of *Inland Finance Company* v. *Commissioner*, 23 B. T. A. 199, upon facts practically identical with those in

Opinion of the Court

the instant case. The Board's decision in this case, upon review, was affirmed by the Circuit Court of Appeals for the Ninth Circuit, 63 Fed. (2d) 886. The court in its opinion said:

> * * * we are of opinion that the Board correctly determined that the forfeited payments did not constitute "income", as the term has been defined; namely, gain derived from capital or labor, or from both combined. *Eisner* v. *Macomber*, 252 U. S. 189.

The rule announced by the Board in the cases cited is that enunciated in Fletcher's *Cyclopedia Corporations* (permanent edition) Vol. 11, Sec. 5345, where it is said:

> Property or money which represents an investment of the capital stock of a corporation, or of any part thereof, cannot be regarded as surplus profits, and distributed as dividends, irrespective of the financial condition of the corporation. When a person subscribes for or purchases shares of stock in a corporation, and pays a part only of the amount due thereon, and the shares are afterwards forfeited for nonpayment of the balance, the amount paid is not profits, but a part of the capital.

The same rule is laid down in Clark & Marshall on *Private Corporations*, Vol. 2, page 1589, Sec. 520, where it is said:

> When a person subscribes for or purchases shares of stock in a corporation, and pays a part only of the amount due thereon, and the shares are afterwards forfeited for nonpayment of the balance, the amount paid is not profits, but a part of the capital, and cannot be divided among the stockholders.

Upon the foregoing authorities it is held that the forfeited payments in this case, amounting to $28,351.89, did not constitute taxable income to the plaintiff, and that the taxes involved were erroneously imposed. The plaintiff is therefore entitled to recover, and judgment in its favor is awarded in the sum of $2,142.74, with interest thereon as provided by law.

It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

# THE DIXIE TERMINAL CO. v. THE UNITED STATES

[No. 42948. Decided November 9, 1936]

## *On the Proofs*

*Interest on Fourth Liberty Loan bond after call for redemption, and redemption in gold refused; Government's liability for interest.*—The United States is not liable for interest except where it is provided for by statute or express contract, and its liability in any case is limited to the terms of the statute or contract providing therefor.

*Same; when bond "payable".*—Under the provision of the Fourth Liberty Loan bonds for payment of interest until the principal of the bond should be "payable", such bonds, when duly called by the Government for redemption prior to maturity, became payable, within the meaning of the provision, on the date for redemption designated in the call.

*Same; validity of call for redemption prior to maturity where Government refused to redeem in gold in accordance with terms of bond; interest after date for redemption.*—Where it was provided by the Fourth Liberty Loan bonds for payment of interest thereon until the principal of the bond should be payable, and by the Treasury Department circular made a part of the bonds by reference that interest on any of such bonds called by the Government for redemption prior to maturity should cease upon the redemption date designated in the call, a call by the Government on October 12, 1933, for redemption on April 15, 1934, of one of said bonds, subsequently acquired by the plaintiff on March 9, 1935, was a valid call, and interest on said bond ceased on the redemption date specified in the call, notwithstanding subsequent refusal by the Government to redeem the bond in gold in accordance with the provisions thereof.

*The Reporter's* statement of the case:

*Mr. Robert A. Taft* for the plaintiff.
*Mr. Assistant Attorney General James W. Morris* for the defendant. *Mr. Harry LeRoy Jones* was on the brief.

In this action plaintiff seeks to recover in currency of the United States the amount specified in an interest coupon attached to a Fourth Liberty Loan 4¼% Gold Bond in the

principal amount of $50 issued pursuant to the Act of Congress of September 24, 1917, Treasury Department Circular 121, September 28, 1918.

The due date of this coupon was October 15, 1934, six months after the date on which the principal of the bond became payable under a call for redemption duly issued by the defendant. This interest coupon provided for the payment of interest therein specified, unless the bond was called for previous redemption. The bond provided that the United States would pay interest on the amount thereof "until the principal hereof shall become payable." The bond and circular, pursuant to which the bond was issued, provided that the bond might be redeemed at the pleasure of the United States in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice, given in such manner as the Secretary of the Treasury should prescribe and "from the date of redemption designated in any such notice interest on bonds called for redemption shall cease."

Plaintiff contends that the defendant's call for redemption was ineffective because of the Government's refusal to pay the bond in gold and that interest continued to accrue and become payable on the bonds thus called for redemption. Similar calls for redemption were made by the United States about the same time with respect to gold-clause bonds totaling $8,849,540,000.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

**1.** March 9, 1935, plaintiff, an Ohio corporation, purchased a bond of the United States in the principal sum of $50, known as the Fourth Liberty Loan 4¼% Gold Bond of 1933–1938, serial number A00055321, and paid therefor $51.75 plus $5.31, accrued interest, totaling $57.06. This bond is in evidence as plaintiff's exhibit 2, and such exhibit and all other exhibits hereinafter mentioned are made a part of these findings by reference. Payment was made for the bond by New York draft payable in dollars. At this time the Fourth Liberty Loan 4¼% Bonds of 1933–1938 in coupon form, bearing the serial numbers the final digit of which

was 9, 0, or 1, such serial numbers, in the case of permanent coupon bonds, prefixed by the distinguishing letters J, K, or A, respectively, and designated in Treasury Department Circular 501, as called for redemption on April 15, 1934, were not listed on any exchange but were occasionally available in the open market and selling at not in excess of their dollar face amount and interest accrued to the date of redemption as fixed in the notice of call embodied in the Treasury Department circular.

Plaintiff was not engaged or authorized to engage in any business in which gold coin or gold bullion was necessary for its operation.

At the time of purchase this bond had attached to it interest coupons maturing April 15, 1933, October 15, 1933, April 15, 1934, and October 15, 1934. The interest coupon covering the period April 15 to October 15, 1934, upon which this suit is based, is in evidence as plaintiff's exhibit 3. The bond to which the interest coupon in question was attached is one of a series of 4¼% gold bonds authorized by an Act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department Circular 121 of September 28, 1918. This circular, which is in evidence as plaintiff's exhibit 5, provided in part as follows:

> The bonds will be dated October 24, 1918, and will bear interest from that date at the rate of four and one-quarter percent per annum, payable on April 15 and October 15 in each year. The interest payable on April 15, 1919, will be for 173 days. The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. In case of partial redemption the bonds to be redeemed will be determined by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease. The principal and interest of the bonds are payable in United States gold coin of the present standard of value.

2. October 11, 1933, the Acting Secretary of the Treasury, pursuant to the requirement of Circular 121, prescribed rules for the determination of the bonds to be called in partial redemption of the Fourth Liberty Loan 4¼% bonds of 1933–1938, and designated the manner of giving notice of the bonds so called for redemption. A copy of these rules is in evidence as joint exhibit A. On the same day the Acting Secretary of the Treasury issued a certificate of partial redemption of the Fourth Liberty Loan 4¼% bonds of 1933–1938, bearing serial numbers, the final digit of which was 9, 0, or 1, such serial numbers, in the case of permanent coupon bonds, prefixed by the distinguishing letters J. K, or A, respectively. This certificate is in evidence as joint exhibit B.

The following day, October 12, 1933, the Secretary of the Treasury issued a notice of call for partial redemption on April 15, 1934, of the Fourth Liberty Loan 4¼% gold bonds of 1933–1938, in which the bond in controversy was included. This notice of call is in evidence as joint exhibit C. This call for redemption stated, so far as material here, as follows:

> Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼ percent bonds of 1933–38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934. * * *
>
> Holders of Fourth 4¼'s are offered the privilege, for a limited period, beginning October 16, 1933, of exchanging all or part of their bonds (whether called or uncalled) for a new issue of 10–12 year Treasury bonds, dated October 15, 1933, and bearing interest from that date at the rate of 4¼ percent per annum until October 15, 1934, and thereafter at the rate of 3¼ percent per annum.

3. March 11, 1935, plaintiff presented the bond with the coupons for the six-months periods ending on and before October 15, 1934, detached, to the Treasurer of the United States and demanded the redemption of the bond by the

payment of 50 gold dollars, each containing 25.8 grains of gold, .9 fine. At the time of this demand the Treasurer refused payment of the bond in gold, but the defendant was ready and willing to make full payment at par in coin or currency of the United States legal tender. Plaintiff, thereupon, refused to accept payment for the bond at par in legal-tender currency and retained the bond. Thereafter, on the same date, plaintiff presented the interest coupon for the six-months period ending October 15, 1934, to the Treasurer of the United States and demanded payment therefor in the sum of $1.07, either in gold coin or legal-tender currency. The Treasurer refused payment on the ground that the bond had been called for redemption on April 15, 1934.

4. The plaintiff on March 11, 1935, held no license authorizing it to receive or hold gold coin or gold bullion. It owned no Government bond containing a gold clause on June 5, 1933, October 12, 1933, April 15, 1934, or October 15, 1934.

The court decided that plaintiff was not entitled to recover.

Littleton, *Judge*, delivered the opinion of the court:

The question presented in this case is whether the interest coupon upon which this suit is based covering the period April 15 to October 15, 1934, is an obligation of the United States upon which this action can be maintained, in view of the terms of the Liberty bond obligation and notice of call for redemption on April 15, 1934.

Plaintiff contends (1) that the provisions of the bond and circular with respect to payment of gold are valid, notwithstanding the joint resolution of Congress of June 5, 1933, and the Gold Reserve Act of January 30, 1934; (2) that the lack of remedy found to exist in *Perry* v. *United States*, 294 U. S. 330, is not material in this case, inasmuch as plaintiff is not suing for gold, and is not seeking damages for failure to pay gold, but is claiming only that the Government was without authority to call the bonds in advance of maturity unless it tendered gold or its equivalent; (3) that the failure of the Government to pay this bond in gold when presented March 11, 1935, invalidated the call; that the condition upon which interest was to cease was that six months' notice be

given and that the bonds be redeemed when presented, in United States gold coin of the former standard of value, and that, inasmuch as this condition was not fulfilled, interest did not cease; (4) that the action of Congress in refusing to permit the payment of gold coin and attempting to invalidate the Government's obligation to pay in such coin, coupled with the refusal of the Treasurer to pay this bond and former coupons in gold coin constituted a repudiation of the Government's obligation on the bond and that, while such repudiation continued, the Government could not assert an option given it against the plaintiff to redeem the bond; (5) that the call issued in Treasury Department Circular 501 on October 12, 1933, was void *ab initio*, for the reason that in view of the action of Congress and the President in requiring all gold to be delivered to the United States, which action was taken prior to June 1933, and in view of the joint resolution of June 5, 1933, the call was an attempt to call these bonds by the payment of currency.

Plaintiff seeks to recover interest and its case rests upon a contractual obligation. At the outset it should be noted that the United States is not liable for interest, except by its express consent by statute or contract, and that its obligation to pay interest in any case is limited strictly to the terms of the statute or contract providing therefor. Plaintiff's bond stated that it was issued pursuant to Treasury Department Circular 121 of September 28, 1918, and incorporated by reference the provisions of that circular. The bond and this circular therefore constitute the Government's contract. In this circular, under the heading "Rate of Interest, Date of Bonds, Maturity and Redemption" is contained the following provision:

> The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days on six months' notice given in such manner as the Secretary of the Treasury shall prescribe * * *. *From the date of redemption designated in any such notice interest on bonds called for redemption shall cease.* [Italics ours.]

In addition, the Fourth Liberty bond purchased by plaintiff, to which the interest coupon involved in this case was attached, provided that "The United States of America for value received promises * * * to pay interest on said principal sum * * * *until the principal hereof shall be payable*." [Italics ours.]

It seems clear to us from the above that by the agreement of the parties the obligation of the defendant to pay interest on the bond ceased upon the issuance of notice of call and passage of time to the date designated for redemption in such notice. It is agreed that a notice of call was issued and a date fixed for redemption prior to the period for which plaintiff is now demanding interest. Moreover, the contract between the parties did not require that there be a redemption of the bond in order that interest on the obligation as such should terminate. It required only the giving of notice of call for redemption, which was admittedly done, and the arrival of the date specified in that notice. This fact and the provision of the bond itself that interest would run only until the principal of the bond should become payable distinguish the case of *Sterling* v. *Watson Co.*, 241 Pa. 105, and *Corbett, Executrix*, v. *McClintic Marshall Corp.*, 17 Del. Chan. 165, cited and relied upon by plaintiff.

The clause in the bond in question that the United States will pay interest on the principal of the bond "until the principal hereof shall be payable" clearly discloses that the interest obligation was to run only until the date designated for redemption, namely, when the principal became "payable." It cannot be denied that the principal was payable April 15, 1934. Plaintiff concedes that by virtue of the notice of call for redemption the principal of the bond became payable, but contends that the bond holder also had the option of availing itself of the terms of the call and suing for immediate payment. But the word "payable" does not mean paid.

In *Morgan* v. *United States*, 113 U. S. 476, it was held that the purchase of bonds of the United States after the redemption date was not, under the circumstances, a purchase of discredited paper within the usual rules relating to negotiable instruments, and the court said "The legal effect of the call undoubtedly is to entitle the holder to demand pay-

ment at its maturity and, even though not demanded to exonerate the Government from liability for interest accruing after that date, * * * the obligation to pay interest ceases because that is the contract to which the holder of the bond has consented, and to which he submits." See also *Perry* v. *United States*, *supra; Compania de Inversiones Internacionales* v. *Mortgage Bank of Finland*, 269 N. Y. 22 (certiorari denied); *Spaulding* v. *Lord*, 19 Wisc. 533.

The interest coupon sued upon also conditioned the right of the holder to demand interest, upon whether the bond had been called for redemption. This coupon provided as follows: "The United States of America will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50, 4th Liberty Loan 4¼% Gold Bond of 1933–1938, unless called for previous redemption."

It seems clear from what has been said above that in order for plaintiff to recover it would be necessary for the court to ignore the specific and positive provisions of the contract relating to the matter of interest. But plaintiff insists that because the principal of the bond was not paid in gold and that inasmuch as the defendant, at the time the call was issued, intended to redeem the bond in coin or currency of the United States, the call was void and of no effect and that the obligation of the United States to pay interest continued until maturity of the bond. With this we cannot agree. The nature of the call conformed to the requirements of the statute and of the bond, and the action taken by the United States on the date when the principal of the bond became payable under the call, or when it was presented for redemption, which plaintiff claims was not in accordance with the obligation assumed by the United States in the bond, may have given rise to a cause of action with respect to the principal or accrued interest (*Perry* v. *United States*, *supra; Nortz* v. *United States*, 294 U. S. 317, 328); but any failure of the United States to comply with the contract with respect to payment of the principal of the bond in gold did not change or modify the specific terms of the agreement with respect to interest subsequent to April 15, 1934. *Morgan* v. *United States*, *supra.*

Syllabus

In *Machen* v. *United States*, decided June 20, 1936, the District Court for the District of Maryland, denied interest in a case similar to the one at bar, holding that the United States had an unqualified right to call the bond for redemption in accordance with the provision in the bond to which the plaintiff must be deemed to have agreed upon its purchase, and that if the plaintiff considered himself injured by the Government's failure to redeem by payment in gold, his only remedy was to bring suit upon the principal obligation of the bond.

In a proper case a plaintiff might be entitled to demand interest at the legal rate rather than the contract rate after a bond has been called for redemption and after the principal has become payable. *Spaulding* v. *Lord*, *supra*. But this suit is not and cannot be a suit for legal interest for the reason that an obligation of the United States to pay interest can only arise by its own express consent and contract. *United States* v. *North Carolina*, 136 U. S. 211.

Under the terms of the contract involved in this case and upon the facts of record, we are of opinion that plaintiff is not entitled to recover, and its petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## BRIGGS & TURIVAS, A CORPORATION v. THE UNITED STATES

[No. E–383. Decided November 9, 1936]

*On the Proofs*

*Contract; sale of surplus property by Emergency Fleet Corporation; authority of officer to sell; validity of sales agreement.*—Where the Emergency Fleet Corporation was vested with authority for the sale and disposition of surplus property belonging to it, and its bylaws provided that its vice presidents should perform such duties as should be assigned or delegated to them by the president of the corporation, "including the power to sign contracts and other instruments"; and a vice president of the corporation was authorized and directed by its president to sell such property; the vice president had due authority to sell.

Reporter's Statement of the Case

*Same; memorandum of sale; formal written contract merely evidence of agreement.*—The formal written contract executed by the parties to an agreement is not the agreement, but merely the evidence of the agreement; and where a memorandum of sale is signed by the parties, containing all essential contractual elements, it is sufficient to establish a sales agreement, or contract, and bind the parties thereto, although the formal contract contemplated by the parties was never executed.

*Breach of contract; damages for breach.*—Where an agreement between the plaintiff and a duly authorized officer of the Emergency Fleet Corporation for sale to plaintiff of surplus property of the corporation was arbitrarily and capriciously set aside by the president of the corporation and the property resold by him, his action constituted a breach of contract for which the plaintiff is entitled to recover damages against the Government.

*Measure of damage for breach of contract.*—For the breach of the plaintiff's contract by the Emergency Fleet Corporation by the setting aside of its sale of surplus property to plaintiff and reselling the property to others, the measure of the damage to which the plaintiff is entitled is the difference between the plaintiff's contract prices and the market prices at the times when and places where the property was delivered to other parties.

*The Reporter's* statement of the case:

*Mr. Albert L. Hopkins* for the plaintiff. *Hopkins, Starr & Hopkins*, and *Messrs. John L. Hopkins, Donald J. DeWolfe, Merritt Starr*, and *George K. Bowden* were on the briefs.

*Mr. Oliver P. M. Brown*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Sam M. Wassell* was on the briefs.

The court made special findings of fact as follows:

**1.** The plaintiff, Briggs & Turivas, was at all times herein mentioned and still is a corporation organized and existing under and by virtue of the laws of the State of Illinois with its principal office and place of business at Chicago, Illinois, and engaged in the business of buying, selling, and dealing in steel and iron materials. At the times herein mentioned plaintiff had offices in Milwaukee, Pittsburgh, New York, San Francisco, Detroit, and Toronto, and did business in buying and selling steel in all those places.

2. On April 16, 1917, pursuant to section 11 of the act of September 7, 1916, chapters 451–785, the United States Shipping Board caused to be incorporated and organized under the laws of the District of Columbia a corporation named "The United States Shipping Board Emergency Fleet Corporation", hereinafter referred to as the "Fleet Corporation." All of the capital stock of the Fleet Corporation was subscribed for by and issued to the said board for and on behalf of the United States.

3. On January 15, 1919, the Board of Trustees of the Fleet Corporation by resolution authorized its Director General or General Manager to make settlement of claims from contractors on contracts ordered canceled or authorized to be canceled by the Board, and to dispose of surplus material arising therefrom "at such prices as he shall deem the best obtainable under all of the circumstances", transactions where a net loss to the Government in any claim would exceed $25,000 to "be made by the Director General or General Manager, with the concurrence of one other Person to be nominated by the General Manager and approved by the Board of Trustees."

On or about April 28, 1919, the president of the Fleet Corporation was Edward N. Hurley, with the power and authority to make contracts in the name, and on behalf of, the Fleet Corporation, and to delegate such power to a vice president. On said date President Hurley delegated said power and authority to a vice president, one J. L. Ackerson, and on May 5, 1919, delegated also to Vice President Akerson the powers and duties of the office of the Director General. On May 13, 1919, the Board of Trustees approved the action of President Hurley in delegating to Vice President Ackerson the power and authority to sign contracts in the name, and on behalf of the Fleet Corporation, and on that date adopted the following resolutions:

> *Resolved*, That the Board of Trustees hereby revokes any and all authority heretofore conferred on the Director-General of the Emergency Fleet Corporation to cancel or suspend contracts, etc.; and
>
> *Be it further resolved*, That Vice-President J. L. Ackerson be, and he is hereby authorized, on behalf of the United States Shipping Board Emergency Fleet

> Corporation, to exercise the powers of the said Emergency Fleet Corporation with reference to the cancellation of and/or suspension of contracts.

and

> *Resolved*, That the powers and duties which have heretofore been vested in or conferred on the General Manager and/or Director-General of this Corporation be, and they are hereby, revoked.

On May 22, 1919, Vice President Ackerson, by General Order No. 198, established the "Sales Review Board", consisting of designated personnel, with jurisdiction specified as follows:

> The Sales Review Board is charged with the approval or disapproval of all sales transactions involving the disposal of property, materials, or supplies belonging to the corporation where the original cost of the item or items covered exceeded five thousand dollars ($5,000). With the single exception of the "terms of payment" part of such sales transactions, the decisions of the Sales Review Board will be final as to approval or disapproval of such transactions.

The order further recited that approval or disapproval might be given by the Board as follows:

> 1. By actual consideration of negotiated sale of agreements.
>
> 2. By sanctioning, in advance, the proposed detail of a sales transaction which, if consummated in accordance with the advance rulings, is considered approved by the Board.
>
> 3. By approving for issue minimum price lists whereby all sales at prices not lower than the minimum quoted as approved automatically.

On June 26, 1919, Vice President Ackerson became a member of the Board of Trustees of the Fleet Corporation.

On July 23, 1919, the Executive Committee of the Fleet Corporation by resolution approved the Sales Review Board as established, and approved its nomination by Vice President Ackerson to act, within its jurisdiction, as the "one other person" mentioned in the resolution of the Board of Trustees January 15, 1919 (supra).

4. By Executive Order No. 3145 of August 11, 1919, the President of the United States directed the United States

Shipping Board to exercise all powers and authority then vested in him in reference to the disposition of materials or plants defined in the acts of July 19, 1919, and June 15, 1917, and after directing the said board in its discretion to sell, lease, or otherwise dispose of such property by public or private sale, directed "that such sales, leases, or other disposition shall be made directly by the said board or by it, in its discretion, through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose."

The material hereinafter described was part of the material defined in the said acts.

**5.** By General Order No. 236, dated August 19, 1919, effective August 25, 1919, Vice President Ackerson abolished the Sales Review Board and transferred its duties and jurisdiction to the Cancellation, Claims, and Contracts Board, theretofore created by him and approved by the Executive Committee of the Fleet Corporation. The name of the Cancellation, Claims, and Contracts Board was changed by Vice President Ackerson September 9, 1919, to General Cancellations, Claims, and Contracts Board.

**6.** On September 23, 1919, the United States Shipping Board directed the sales, leases, or other disposition mentioned in Finding 4 to "be made through the United States Shipping Board Emergency Fleet Corporation."

**7.** Article III of the bylaws of the Fleet Corporation, in effect at the time of the transactions here involved, provided:

> SECTION 2. The President * * * shall together with the Secretary, sign all contracts and other instruments on behalf of the Corporation. * * *
>
> SECTION 3. The Vice Presidents shall perform such duties as may be assigned or delegated to them by the President, including the power to sign contracts and other instruments.

**8.** The president of the Fleet Corporation from August 7, 1919, or thereabout, to some time in April 1920, was John Barton Payne, and President Payne had the same contractual power and authority, including that of delegating same, as his predecessor, the said President Hurley.

President Payne had his offices in Washington, D. C.; Vice President Ackerson's offices were located in Philadelphia, Pa.

**9.** Under date of October 27, 1919, a memorandum was sent to Ackerson by President Payne reading in part as follows:

MEMORANDUM FOR MR. ACKERSON

> Emphasizing our discussion of Saturday, please make vigorous efforts:
>
> (a) To dispose of all materials we may have on hand at any point not absolutely necessary for shipbuilding; steel, lumber, machinery, house plants, wooden hulls, shipbuilding yards not being used—in short, everything. This is a good time to sell things, and I want it dealt with vigorously. * * *.

To this Vice President Ackerson responded:

> 1. We are doing our utmost to dispose of any and all surplus material and equipment. Our sales last week ran over $700,000, which is an increase of 25% over the preceding week. At the new price of $75,000, we sold today three wood hulls. This is a good start.
>
> 2. Regarding pending settlements—now that a general policy has been established, settlements will be made expeditiously. We are making every endeavor to insure that while they shall be on a just basis both as regards the Fleet Corporation and the Contractor, there shall be no generosity.

On or about December 1, 1919, the Fleet Corporation, after classifying its surplus iron and steel and compiling an inventory of the same and its locations, investigated market conditions and consulted several leading steel companies, including the United States Steel Corporation, Lackawanna Steel Company, and Jones & Laughlin in order to ascertain a fair tentative value at which to sell the said surplus.

The values arrived at were somewhat less than the prices set forth in plaintiff's final bid, referred to in Finding 13, *infra.*

**10.** On December 4, 1919, the General Cancellations, Claims and Contracts Board, approved an agreement of

sale of surplus steel to Harris Brothers & Company, and entered upon its minutes the following:

> The Board considered a proposed agreement by Mr. J. L. Allen, Assistant Manager, Supply & Sales Division, covering the disposal of surplus steel to Harris Brothers & Company, and after a thorough discussion, approved the prices named in the agreement, and the agreement as a whole, subject to certain further negotiations to be carried on by Mr. Allen, and further, that after the said negotiations are completed, the Contract is to be approved by Mr. R. E. Talbert, before execution.

The prices named in the so-called agreement with Harris Brothers & Company were less than the prices thereafter, as hereinafter shown, bid by the plaintiff, Briggs & Turivas. R. E. Talbert was assistant counsel in the law department of the Fleet Corporation, and his duty with respect to any sale of the surplus material herein involved was to approve or disapprove only the form of the contract.

**11.** Plaintiff learned of the material which the Fleet Corporation had for sale, and on December 10, 1919, one of plaintiff's representatives called at the offices of the Fleet Corporation in Washington, D. C., upon its president to buy the material. The president told him that the approximate prices would be $45 and $43 per gross ton for the unfabricated and $22.50 per gross ton for the fabricated material, and urged him to go to Vice President Ackerson in Philadelphia the next morning and buy the material at those prices. President Payne further stated that he would telephone Vice President Ackerson. Thereupon, on December 10, 1919, the president called the said Vice President Ackerson by long-distance telephone and stated to him that he was sending someone to confer with him with reference to the purchase of the material. In this telephone conversation Vice President Ackerson informed President Payne that they were negotiating with one, possibly two, other parties, for the sale of this same material and mentioned the price that they had been considering. President Payne responded that he thought the party he was sending would pay a higher price.

Ralph D. Young, one of the bidders present at the transaction referred to in Finding 13, also called upon President Payne in Washington with reference to the material which the Fleet Corporation had for sale and was told by Payne that the material was for sale and that Ackerson had the selling of the material.

**12.** On the morning of December 11, 1919, Carl R. Briggs, president of plaintiff corporation, with the representative of plaintiff corporation who had so conferred with the president of the Fleet Corporation in Washington on December 10, 1919, went to the office of the Fleet Corporation in Philadelphia and there met J. Lee Allen, Assistant Manager of the Fleet Corporation's supply and sale division. Briggs advised Allen that the president of the Fleet Corporation had sent him to purchase the surplus iron and steel which they had for sale. Allen informed Briggs that the Fleet Corporation was having many negotiations on it and had prepared a form of contract which would be used with any one who purchased the material. Allen gave Briggs a copy of the said form. A copy thereof is filed in the case as plaintiff's Exhibit No. 2 and the same is made a part of this finding by reference. Briggs read the form and told Allen that it was satisfactory. This form had been prepared during prior negotiations with Harris Brothers & Company for the sale of this surplus iron and steel, had been drawn and revised three times, and had been approved by the General Cancellations, Claims and Contracts Board. Allen also gave Briggs a mimeographed slip showing the quantities and locations of the surplus iron and steel. Allen then took Briggs into Vice President Ackerson's office. There were present in Vice President Ackerson's office and remained there throughout the whole proceeding on December 11, 1919, the following: J. L. Ackerson, vice president of the Fleet Corporation; H. H. Weaver, member of the General Cancellations, Claims & Contracts Board thereof; and J. Lee Allen, assistant manager of the Supply & Sales Division thereof.

**13.** Upon the entry of Briggs into his office Vice President Ackerson told him that he had been expected, as the president of the Fleet Corporation had told him he, Briggs,

would be in to negotiate for the purchase of the material. Vice President Ackerson told Briggs also that there had been more or less negotiation for its sale, and that the president of the Fleet Corporation had authorized him to sell it.

Briggs informed Vice President Ackerson that the president of the Fleet Corporation had told plaintiff's representative that the approximate prices would be $45 and $43 per gross ton for the unfabricated material and $22.50 per gross ton for the fabricated material.

Vice President Ackerson and the aforesaid Allen both told Briggs that upon making the purchase he would be required to deposit a check for $50,000, and upon signing the formal contract to which Vice President Ackerson referred and as to which Briggs then and there expressed himself as satisfied, an additional check for $350,000.

Briggs then submitted a bid of $45, and $43 if not loaded, per gross ton for the unfabricated material and $22.50 per gross ton for the fabricated material. Vice President Ackerson then asked Briggs to step out and a group representing another prospective purchaser came in and submitted a bid slightly higher than Briggs. This group stepped out and Briggs was asked to come in. Briggs raised their bid and again stepped out while the other group came in, this procedure being repeated until there were eleven or twelve bids submitted. Briggs finally made a bid of $45.41 and $43.41 per gross ton on the unfabricated material and $22.65½ per gross ton on the fabricated material. This bid was the highest submitted, and Briggs was told by Vice President Ackerson that his company was the purchaser of the material.

Vice President Ackerson then called the president of the Fleet Corporation in Washington by long distance telephone and advised him of Briggs' bid, told him that it had been accepted, and the president in reply approved and confirmed the sale. Vice President Ackerson immediately caused to be prepared in his office a typewritten memorandum of sale, Briggs filled in the prices with ink and signed it, and the vice president endorsed the document as follows:

*11 December.*

*Prices* Accepted subj. to drawing contract.

J. L. ACKERSON.

This memorandum was executed in duplicate and an executed copy retained by each party, and is as follows:

11 DEC.

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
*140 North Broad Street, Philadelphia, Pa.*
(Attention Mr. J. L. Ackerson, Vice President.)

GENTLEMEN: As per conversation had with you relative to the sale of all of your fabricated and unfabricated iron and steel materials, we confirm having offered you the following:

| | |
|---|---|
| For all of the unfabricated materials located at the plants of the American Bridge Company | $43 41/G |
| For all the fabricated material located at plants of the American Bridge Company | $22 65½/G |
| For all material located outside of these plants at points east of the Rockies and north of Wilmington, North Carolina, for the unfabricated material | $45 41/G |
| For all fabricated material | $22 65½/G |

It is understood that all materials above mentioned are to be loaded f. o. b. cars at the various points of shipments exception material at Pottstown, Hayes, and Leetsdale warehouses.

Very truly yours,

BRIGGS AND TURIVAS,
(Signed) By CARL R. BRIGGS, *Pres.*
*11 December.*

*Prices* Accepted subj. to drawing contract.
(Signed) J. L. ACKERSON.

**14.** Immediately after Vice President Ackerson and Briggs had signed the foregoing memorandum of sale Briggs gave the vice president plaintiff's check in the sum of $50,000, which the Fleet Corporation accepted as part payment of the purchase price and sent to Chicago and caused to be certified on December 13, 1919. On or about December 13, 1919, Briggs went to the vice president's office and asked to sign the aforesaid formal contract but was told that it was not yet ready. On December 15 or 16, 1919, Briggs also delivered to Vice President Ackerson plaintiff's additional

check in the sum of $350,000, which the Fleet Corporation also accepted as further payment on the purchase price.

At that time Briggs also stated to Vice President Ackerson that he desired then and there to sign the formal contract, but was again told that it was not yet ready.

**15.** The market price of steel rose rapidly during the week following December 11, 1919, so that during this week there was an average rise on all steel products of five dollars a ton and on ship plate of ten dollars a ton.

Harris Brothers & Company communicated with President Payne and on December 15, 1919, made a bid higher than that previously given.

On the same day the following telegram was received by President Payne from Senator James Hamilton Lewis, attorney for plaintiff:

A 18 NY 143 NL Bi

NEW YORK, N. Y.,
*December 14, 1919.*

Hon. JOHN BARTON PAYNE,
*Chairman Shipping Board,*
*Washington, D. C.:*

Please forgive me for troubling you again in the matter of Greenburg Briggs and Tervis bid and contract they are informed that after they had their bid accepted and contract closed interlopers who assume if they can get new bid accepted they can get contract away from my clients I would be embarrassed on such event by being responsible for directing the money they put up with your board to be taken from other prospects it was listed in and put on their accepted bid if it shall now be taken from them by what they think is a trick on your board I will have gotten them into the predicament of a loss of both opportunities please do me the kindness to look into this matter and if not inconsistent with Government welfare close up the matter with the now accepted bidders.

JAS. HAMILTON LEWIS.

December 15, 1919—846 AM

President Payne notified plaintiff and others by telegram on or about December 15 of another sale of the steel to be held at his office on December 18, 1919.

On that date an auction was held at President Payne's office. Immediately before the sale took place Senator Lewis

called on President Payne and stated to him that the plaintiff had a binding contract and protested against a resale of the steel. Plaintiff and its attorney, Senator James Hamilton Lewis, were present at the auction, and Senator Lewis made a protest on behalf of plaintiff in the presence of the other bidders, at the beginning of the proceedings and a second protest after the auction had been held.

Plaintiff, subject to and without waiving its protest, bid up to the price which it had agreed to pay in the memorandum of December 11th; but the material was then sold to the Barde Steel Products Corporation at $45 per net ton for unfabricated material and $25 per net ton for the fabricated material. A formal contract was executed with the Barde Steel Products Corporation, which is in evidence as plaintiff's exhibit 1–B and is by reference made a part of this finding.

On December 24, 1919, plaintiff's checks in the respective amounts of $50,000 and $350,000 were returned to plaintiff by letter from the Fleet Corporation. The material covered by the memorandum of December 11, 1919, was delivered to the Barde Steel Products Corporation during the year 1920, and no part of the same was ever delivered to plaintiff.

**16.** The prices per ton of $45.41, $43.41, and $22.65½, re-respectively, as specified in the memorandum of sale of December 11, 1919, when applied to the various grades and quantities so delivered to the Barde Steel Products Corporation, give a total price of $3,080,355.00.

The total price paid therefor by the Barde Steel Products Corporation in accordance with their bids of $45 and $25, respectively, on December 18, 1919, as specified in Finding 15, was $3,541,768.00.

**17.** Throughout the year 1920 market prices continued to rise and remained very much higher than the prices named in Finding 16.

The market prices at the various dates and places where delivery of the material would have been made to the plaintiff pursuant to the memorandum of sale of December 11, 1919, exceeded the total price called for by that memorandum, to wit, $3,080,355.00, by the sum of $2,778,333.00.

**18.** Under date of January 28, 1920, the Fleet Corporation adopted the following resolution:

> *Resolved*, That all power and authority heretofore delegated by this Board or by the president of the Corporation to Vice President Ackerson, with regard to sale of surplus and/or salvage property, real or personal, of the Corporation be, and the same hereby is, revoked.

**19.** The plaintiff did not have actual knowledge or notice of any of the resolutions of the board of trustees or the executive committee of the Fleet Corporation, nor of any of its general orders prior to their introduction in evidence in this case, nor were they in any manner or way called to its attention.

**20.** During the year 1922 plaintiff filed with and presented to the United States Shipping Board a claim for damages for breach of contract, being the same agreement which is the subject matter of this suit. The claim so filed and presented was entitled: "Before the United States Shipping Board. *Briggs & Turivas, Inc.*, vs. *United States Shipping Board Emergency Fleet Corporation.*"

The said claim was denied and rejected in its entirety by the Fleet Corporation and by the United States Shipping Board on or about March 24, 1923.

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff brings this action for damages for the breach of an express contract entered into on December 11, 1919, between plaintiff and the United States Shipping Board Emergency Fleet Corporation, acting for and on behalf of the defendant, for the sale by the latter to the former of a large quantity of surplus iron and steel originally acquired for the purpose of building ships.

A summary of the facts is as follows: Throughout the year 1919 a division of the Emergency Fleet Corporation was located in Philadelphia, Pennsylvania, in charge of a Vice President, J. L. Ackerson. After the Armistice, the shipbuilding activities of the Fleet Corporation were sus-

pended and most of its outstanding contracts for materials and construction were canceled. The result was that the Fleet Corporation was left with vast quantities of materials purchased for shipbuilding purposes which could not be used but had to be disposed of.

In July 1919 Congress passed an act granting to the President of the United States the power to dispose of this material. The President delegated his power to the Shipping Board and the Shipping Board delegated its power to the Emergency Fleet Corporation. As a matter of fact, the same disposition of surplus materials had been carried on by the Fleet Corporation for many months under its implied power prior to the President's order.

In August 1919 John Barton Payne became President of the Emergency Fleet Corporation. Immediately after taking office President Payne ascertained that the surplus steel of the Fleet Corporation was being sold by the division presided over by Vice President Ackerson in Philadelphia.

Reports were made to him of the sales which were being made by this division. President Payne urged that the sales be expedited and criticized Vice President Ackerson for not making more vigorous efforts to sell the surplus material. On October 27, 1919, President Payne wrote Vice President Ackerson:

> Emphasizing our discussion of Saturday, please make vigorous efforts: (a) To dispose of all materials we may have on hand at any point not absolutely necessary for shipbuilding; steel, lumber, machinery, house plants, wooden hulls, shipbuilding yards not being used—in short, everything. This is a good time to sell things, and I want it dealt with vigorously.

To this letter Vice President Ackerson wrote President Payne:

> We are doing our utmost to dispose of any and all surplus material and equipment.

He stated in addition that sales in the hundreds of thousands of dollars had been made the previous week. The Fleet Corporation compiled an inventory of the surplus iron and steel, investigated market conditions, and consulted several of the leading steel companies. From this investigation

it arrived at fair values at which to sell the steel in large lots, and the material was listed and the lists distributed and advertised.

President Payne stated not alone to plaintiff but to other parties that Vice President Ackerson, who was in charge of the Supply and Sales Division in Philadelphia, had the selling of all the material of the Fleet Corporation.

In November 1919 Harris Brothers & Company entered into negotiations for the purchase of the fabricated and unfabricated materials at the plant of the American Bridge Company and some large tonnage of material in supply warehouses and storage yards of the Emergency Fleet Corporation. During negotiations with Harris Brothers & Company for the purchase of this material, a form contract was prepared which was agreeable to both parties in the event of their getting together on the purchase price. During these negotiations President Payne was in constant touch with Vice President Ackerson and was kept fully informed as to all terms of the negotiations. Vice President Ackerson conferred with representatives of other steel companies with the object in view of obtaining better bids than that received from Harris Brothers & Company. Telegrams were sent to other prospective purchasers, and the bidding was postponed from time to time until December tenth. On that day, while other parties were in conference with Vice President Ackerson in Philadelphia, plaintiff's representative called on President Payne in his office in Washington and stated that he was desirous of bidding on the sale of this material. President Payne informed plaintiff's representative of the prices for which he believed the material could be purchased and which the plaintiff would have to offer, and thereupon telephoned Vice President Ackerson of the proposed visit of plaintiff's representative and, upon being informed by Vice President Ackerson that he was in conference with other parties for the sale of the material, stated that he would send someone over the next day who would make a higher bid. President Payne informed plaintiff's representative that Vice President Ackerson had the material for sale and that he must go to Philadelphia and see the Vice President.

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The next morning, December eleventh, Briggs, representing Briggs and Turivas, the plaintiff, appeared in Ackerson's office in Philadelphia. When he entered the office of the Fleet Corporation in Philadelphia on this day he met J. Lee Allen, Assistant Manager of the Supply and Sales Division. Briggs stated to Allen that President Payne had sent him over to purchase the surplus material. Allen replied that the Fleet Corporation had had many negotiations for the sale of surplus material and that a form contract had been prepared which would be used with anyone purchasing the material. This form contract, which was handed to Briggs, was the same contract form which had been prepared in negotiations with Harris Brothers & Company. Allen gave a copy of this form contract to Briggs, who, after reading it, informed Allen that it was satisfactory. At the same time Allen also gave Briggs a mimeographed slip showing the quantities and locations of the surplus iron and steel and informed him that the purchaser would be required to deposit a check for $50,000 on the acceptance of his bid and a check for $350,000 on the signing of the form contract.

Allen then took Briggs into Ackerson's office and Vice President Ackerson stated that he was expecting him as President Payne had told him that he was sending him over. Briggs then told Ackerson what he understood would be the approximate prices of the steel and these prices were the same as those stated to Briggs by President Payne. Ackerson then repeated to Briggs the terms previously outlined by Allen, namely, the form contract and the deposit of the check for $50,000 on the acceptance of the bid and the check for $350,000 on the signing of the form contract. Vice President Ackerson was informed by Briggs that he had read the form contract and that it was satisfactory to him. Ackerson stated to Briggs that there had been many negotiations for the sale of the material and he was authorized by President Payne to proceed with the sale. There were present in Vice President Ackerson's office and remained there throughout the whole proceeding, besides the Vice President, H. H. Weaver, member of the General Cancellations, Claims, and Contracts Board, and J. E. Allen, Assistant Manager of the

Supply and Sales Division. The bidding between Briggs and another group then took place, one group stepping out while the other group came into President Ackerson's office. After one group had bid against the other some dozen times, Briggs finally made a bid of $45.41 ($43.31 if not loaded) per gross ton on the unfabricated material and $22.65½ on the fabricated material. This was the highest bid submitted and Vice President Ackerson informed Briggs that he could have the material. Vice President Ackerson ordered his secretary to prepare a memorandum of sale, and, after it was prepared, Briggs filled in the prices in ink and signed it on behalf of the plaintiff. Vice President Ackerson thereupon called President Payne by telephone and advised him that Briggs and Turivas' bid had been accepted and President Payne gave his approval and ratification of the sale. Vice President Ackerson then signed the memorandum of agreement as follows:

"Prices accepted subj. to drawing contract.
"J. L. ACKERSON."

Immediately after the execution of the memorandum agreement, Briggs gave Vice President Ackerson plaintiff's check in the sum of $50,000 which was promptly forwarded to the bank in Chicago upon which it was drawn and caused to be certified on December 13, 1919. A few days thereafter Briggs delivered to Vice President Ackerson plaintiff's check in the sum of $350,000. At the time of the delivery of the latter check, and previous thereto, Briggs went to the Vice President's office and stated that he was there for the purpose of signing the form contract and was told each time that it was not yet ready.

During the week following December eleventh there was a very rapid rise in the price of steel, an average increase of five dollars a ton, and on ship plate a rise of ten dollars a ton. About this time Harris Brothers & Company, who were one of the bidders for this material, communicated with President Payne claiming to have purchased the steel from an employee of the Fleet Corporation who was with the Supply and Sales Division under Ackerson. They stated that if President Payne would offer the material for resale they would make a higher bid than that for which it had been

sold to plaintiff. Plaintiff, having learned that certain unsuccessful bidders were trying to interfere, had its counsel, J. Hamilton Lewis, send a telegram to President Payne protesting against any interference with the contract made with plaintiff. President Payne, under date of December 15th, caused plaintiff and others to be notified by telegram that another sale of the steel would be held in his office in Washington on December 18th. The morning before the sale took place J. Hamilton Lewis called on President Payne and stated to him that the plaintiff had a binding contract and protested against a resale of the steel. When President Payne opened the meeting for the sale of the steel J. Hamilton Lewis again protested on behalf of plaintiff and at the end of the bidding made a further protest. Without waiving the above protest plaintiff bid up to its price which it had contracted to pay on December 11th. The Barde Steel Products Company was the highest bidder at this sale and was awarded the contract. No part of this steel was ever delivered to plaintiff. The market price continued to rise in 1920 and remained very much higher than plaintiff's contract price.

Although the facts are voluminous, we feel it is necessary to make the above extended summary in order that the issues may clearly appear.

The defendant has presented several defenses, some have very properly been abandoned and really only two are forcibly urged. The authority of the Vice President to make a sale of the material is the issue most seriously presented.

It is unnecessary to go into the delegation of the power to the Emergency Fleet Corporation for the parties have stipulated that the "sale and disposition of the iron and steel hereinafter mentioned were, prior to December 11, 1919, duly delegated by said President and said Board to said corporation and so continued throughout the period in which took place the transactions herein stated." The Fleet Corporation had full power to dispose of the material in this suit. The Corporation can only act through its officers and they can only bind the Corporation within the powers delegated to them by the Corporation. Did the Fleet Corpora-

tion authorize its Vice President with power to bind it through his actions in the sale of the surplus material?

In our opinion, the Vice President possessed the authority to make a sale of this material and to bind the corporation in more than one delegation of power. In the first instance, the authority to dispose of the surplus material was specifically conferred upon him by the then President of the Corporation, who acquiesced in his prior sales of material when reports were received from the Vice President. The President sent parties to him to purchase the material, reproved him for not making quick sales; informed this plaintiff, among others, that the sales were being made by the Vice President, sent them to the Vice President, telephoned him not to make a sale until they arrived, and, upon being informed that plaintiff had made the highest bid, ratified and approved the acceptance of the bid. It is not questioned that the President had the power to bind the corporation in a sale of its surplus material. His actions above detailed can convey only the firm conviction that he recognized and acquiesced in the sales by the Vice President. However, it is not necessary to rely solely on the delegation of authority to sell derived from Judge Payne, who was then the President of the Corporation. The records of the Fleet Corporation clearly show such powers were conferred on the Vice President.

A division of the Fleet Corporation was located in Philadelphia and Vice President Ackerson was in charge. All material for the building of ships was purchased by this division, and it was the surplus material which was for sale.

The Fleet Corporation by-laws in Section 3, Article III provide:

> SECTION 3. The Vice Presidents shall perform such duties as may be assigned or delegated to them by the President, including the power to sign contracts and other instruments.

In April 1919 the President of the Corporation specially delegated to Vice President Ackerson the power to make contracts and this delegation was subsequently approved by the Board of Trustees. The authority of the Vice Presi-

dent to bind the corporation by contracts was in effect during the entire year of 1919 and was not taken away from Vice President Ackerson until 1920. The transactions under review happened in the last month of 1919.

The defendant contends that Ackerson filled the position of Vice President and also that of Director General and in the latter capacity he had limited his actions by the requirement that, before a sale could be made, the approval of a Board must be had.

It is apparent that in this instance, if not in all others, Ackerson was acting in the official capacity of Vice President and not that of Director General. The office of Director General had previously been abolished. President Payne sent the plaintiff to the Vice President and the offer of the plaintiff was addressed to the Vice President and accepted by him in that capacity. But, admitting for the sake of argument that Ackerson was acting as Director General, we are of the opinion that the sale made by him met with all the requirements delegated by him to the Board. A very brief review of the authority of this Board will amply confirm our view. The position of Director General of the Emergency Fleet Corporation existed and on January 15, 1919, the Board of Trustees authorized the Director General to settle canceled contracts and dispose of surplus material and if the loss to the United States in any claim should exceed $25,000, the Director General should have the concurrence of one other person to be named by him and approved by the Board of Trustees. On May 5, 1919, the powers of the Director General were transferred to Vice President Ackerson so that thereafter Ackerson had the duties which he formerly had as Vice President, as well as the duties of Director General. Vice President Ackerson then created a "Sales Review Board" to act with him in regard to sales of material where the original cost exceeded $5,000, and appears ultimately to have designated it as the "one other person" mentioned in the Board's resolution of January 15, 1919. This Board was approved by the Executive Committee. Subsequently, this Board was abolished by Ackerson and its duties conferred upon the

Opinion of the Court

"Cancellation, Claims, and Contracts Board." It was provided that the approval of sales could be given by this Board in one of three ways, viz.:

> 1. By actual consideration of negotiated sales of agreement.
> 2. By sanctioning in advance the proposed detail of a sale transaction which if consummated in accordance with advance rulings is considered approved by the Board in advance.
> 3. By approving for issue minimum price lists whereby all sales at prices not lower than the minimum price quoted are approved automatically.

In September Ackerson changed the name of the Board to "General Cancellations, Claims, and Contracts Board."

During the negotiations with Harris Brothers & Company the prices offered by these parties had been approved and a form contract prepared and approved by the Board in a formal resolution. A member of the Board was present when the bids were received and was present when the bid of plaintiff was accepted. The prices accepted were higher than the bid made by Harris Brothers & Company which had already been approved by the General Cancellations, Claims, and Contracts Board; therefore the bid of a price more than the minimum price approved by the Board did not require further action by the Board. It complied with "all sales at prices not lower than the minimum quoted are automatically approved."

From the whole record it is also apparent that in making this sale to the plaintiff Ackerson carried out the procedure which had been established for the disposition of the surplus material. The form contract containing the proposed "detail of sales transaction" and the minimum prices of the material had both been approved by the General Cancellations, Claims, and Contracts Board. We do not think there is any merit in this contention.

We have shown that Ackerson had power to sell as Vice President, as Director General, and also from the express authority given him by President Payne and the approval and confirmation of the sale by the President.

The contention is made that, even if Ackerson had power to make the sale of the surplus material, the memorandum of

sale executed by him does not constitute a binding contract for the reason that the form contract was never signed. The formal contract is not the agreement of the parties but only the evidence of that agreement. It is simply "an additional wheel in the machinery." The legal question for determination is whether the document which was signed contained all the elements of a binding contract between the parties. It has been held too often to need the citation of authorities that if the memorandum or letters signed by the parties contain the elements of a contract, although the signing of a formal contract is contemplated but is never executed, the parties are bound. *Garfielde* v. *United States*, 93 U. S. 242; *American Smelting Co.* v. *United States*, 259 U. S. 75; *United States* v. *Purcell Envelope Co.*, 249 U. S. 313.

All the elements of a contract are present in the memorandum. The Government offered for sale the surplus material and bids were received. The subject matter was known from the lists furnished by the Government to the bidders before the bids were made. The offer by the plaintiff was accepted by the defendant and the payment of $50,000 by the plaintiff was accepted by the defendant as part of the purchase price. The consideration was the giving of the check and certification of it by the bank on which it was drawn. It was the equivalent of the passing of that amount of money in cash from the plaintiff to the credit of the defendant. The subject matter was well known to each party and the terms of the proposed form agreement had been accepted. It is significant that the word "drawing" and not "making" was used by the Vice President when accepting the offer of the plaintiff. The Vice President knew the plaintiff had been given a copy of the form contract, had been informed it would have to agree to its terms if it were awarded a contract and he was fully cognizant that the plaintiff had accepted the terms of the form contract. All that remained to be done in drawing the final contract was to fill in the parties and prices to the sale. The details of the final contract had already been fixed. There was a complete meeting of the minds on every detail. The plaintiff performed all the conditions required of it and even

made the second payment of $350,000 which was accepted. The plaintiff repeatedly offered to execute the formal contract.

The setting aside of the sale to plaintiff and the resale of the surplus material to another party was an arbitrary and capricious act on the part of President Payne which constituted a clear breach of contract. Its seeming justification of enrichment to the Government at the expense of the plaintiff is totally without legal sanction. In our opinion, the memorandum of sale was a binding contract on the Government and its subsequent failure to live up to its terms constituted a breach for which the plaintiff is entitled to damages.

Having found the plaintiff is entitled to damages for a breach of contract, there is left for our decision only the compensation to be awarded.

The Supreme Court has laid down the rule for the breach of an executory contract of sale in the case of *United States* v. *Burton Coal Company*, 273 U. S. 337, as follows:

> The applicable measure of damages is fixed by the rule of law that, where a buyer in violation of an executory contract of sale refuses to accept the commodity sold, the seller may recover the difference between the contract price and the market value at the times when and the places where deliveries should have been made. 2 Williston on Sales, § 582. * * * The difference between that value and the contract price is the amount of damage deemed by the law directly and naturally to result in the ordinary course of events from the appellant's breach of contract.

The measure of damages the plaintiff is entitled to have is the difference between the contract prices and the market prices at the times when and places where the steel was delivered to other parties. This difference we find to be $2,778,333.

The plaintiff is entitled to a judgment for this sum. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

# L. GORDON HAMERSLEY v. THE UNITED STATES

[No. 43147. Decided November 9, 1936]

*On the Proofs*

*Gift tax; tax on transfer of property; gift of Government bonds.*—Gift taxes, like death taxes, are imposed on the exercise of the right to transfer the property, and not on the property itself; and the taxing of a gift of tax-free Government bonds is therefore not a violation of the tax immunity of the bonds.

*Same.*—The mere fact that a tax is in some way related to Government bonds and is measured by the value of the bonds does not make it a tax on the bonds themselves.

*Tax exemption of Government bonds under act of September 24, 1917; exception to exemption; expressio unius est exclusio alterius.*—Both inheritance taxes and gift taxes being upon the *transfer* of the inheritance or gift, and not upon the inheritance or gift itself, the tax exemptions in the act of September 24, 1917, for bonds issued thereunder, even without the stated exceptions to the exemptions, had no legal application to inheritance or gift taxes, and the exception of inheritance taxes from the exemptions was therefore without any legal effect. The fact that the exceptions included inheritance taxes but not gift taxes does not under the rule of *expressio unius est exclusio alterius* establish an intent in the act to exempt the bonds from gift taxes.

*Same.*—A gift by the plaintiff on December 31, 1934, of Government bonds issued under the provisions of the act of September 24, 1917, held to be subject to the gift-tax provisions of the Revenue Act of 1932.

*The Reporter's* statement of the case:

*Mr. Ralph Royall* for the plaintiff. *Messrs. Bartow H. Hall* and *Hoch Reid*, and *Ehrich, Royall, Wheeler & Walter* were on the briefs.

*Mr. George H. Foster*, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant. *Mr. Arnold Raum* was on the brief.

The court made special findings of fact as follows:

The plaintiff, on December 31, 1934, was the owner of \$2,400,000 in principal face amount of The United States of America 3¼% Treasury Bonds, due August 1, 1941,

dated August 15, 1933, with interest coupons maturing February 1, 1935, and all coupons maturing subsequently thereto attached, all of which bonds were of identical form excepting as to amounts and serial numbers, and all contained the following provision:

> This Bond shall be exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess-profits and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations.

This covenant conformed to the act authorizing the issuance of the bonds which contained substantially the same language.

In connection with the public issues of such bonds, the Secretary of the Treasury issued a public circular which contained a provision with reference to exemption from taxes the same as that stated above.

On December 31, 1934, the plaintiff made an irrevocable gift of all of the bonds above referred to.

Subsequently, the Commissioner of Internal Revenue required the plaintiff to file a return under the provisions of the revenue act of 1932 applicable to the gift tax and to pay to the defendant the sum of $322,415 as a tax on the gift made by plaintiff as above recited.

Thereafter, in due time and in proper form, the plaintiff filed a claim for the refund of the tax so paid alleging, among other things, that the levy and collection of the tax was in violation of the contract contained in the bonds with reference to exemption from taxes, deprived the plaintiff of his property without due process of law, and violated the provisions of the Constitution of the United States. This claim for refund was rejected by the Commissioner on the ground that the tax collected was an excise tax on the transfer and not a tax on the subject of the gift.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover a tax collected under the provisions of what is commonly known as the gift tax of the Revenue Act of 1932. There is no dispute as to the facts, which are as follows:

Plaintiff, on December 31, 1934, made a gift of $2,400,000 in principal face amount of United States 3¼% Treasury bonds due August 1, 1941, with interest coupons attached. The Commissioner of Internal Revenue required the plaintiff to make a gift-tax return for 1934 and to pay the sum of $322,415 as a gift tax in connection with the transaction. Thereafter, in due time and proper form, plaintiff filed a claim for refund of the tax on the ground that the law under which it had been assessed was not applicable, and the claim having been denied the plaintiff brought this suit.

The bonds which the plaintiff transferred contained a covenant which read as follows:

> This bond shall be exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess-profits and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations. The interest on an amount of bonds authorized by said Act approved September 24, 1917, as amended, the principal of which does not exceed $5,000, owned by any individual, partnership, association, or corporation, shall be exempt from the taxes provided for in clause (b) above.

This covenant conformed to the act authorizing the issuance of the bonds which contained substantially the same language.

The fact that a tax is in some way related to Government bonds and is measured by the value of the bonds does not make it a tax upon the bonds themselves. In *Central Hanover Bank & Trust Co.* v. *United States*, decided May 4, 1936, *ante*, p. 401, it was held that a tax on profits from

the sale of the bonds was not a tax on the bonds. In *Hitner* v. *Lederer*, 14 Fed. (2d) 991, affirmed 63 Fed. (2d) 877, a payment in bonds was held subject to the income tax on the ground that the bonds themselves were not taxed. So also in *James* v. *Commissioner*, 13 B. T. A. 764, dividends payable in Government bonds were held to be taxable. In *Murdock* v. *Ward*, 178 U. S. 139, it was held that United States bonds belonging to the decedent were subject to an inheritance tax notwithstanding a comprehensive and general provision in the bonds exempting them from taxation. In *Bromley* v. *McCaughn*, 280 U. S. 124, it was held that gift taxes like death taxes are imposed on the exercise of the right to transfer the property and not upon the property itself. While in neither of the opinions in the two cases last cited is it said in so many words that the taxes considered were not taxes upon the bonds themselves, the decisions necessarily so held in effect, for if the taxes in question had been direct taxes upon the bonds they unquestionably would have been invalid for more than one reason. They were, however, upheld by the Supreme Court.

Starting then with the principle established by the cases above cited that the words "all taxation" mean all taxation upon the bonds themselves and do not refer to excise taxes upon some right connected with the bonds, we reach the conclusion that if the exception contained in the bond covenant and upon which the plaintiff relies had been omitted, there would be no question but that the bonds were subject to the tax. In other words, if the covenant had simply provided that the bonds were exempt from "all taxation" these words would not include the tax in question which would have been properly imposed.

The plaintiff urges, however, that the addition of the clause "except estate or inheritance taxes" to the provisions with reference to taxation operates to enlarge the scope of the exemption. Stated in another way, it is contended that since estate and inheritance taxes are specifically excepted from the exemption, other like taxes such as the gift tax, although not mentioned, are not so excepted. It will be observed that the plaintiff seeks to apply the familiar rule of *expressio unius est exclusio alterius*.

The defendant cites a number of cases to show that the exceptions to this principle are numerous and contends that in the case we have before us the rule does not apply. We do not think it is necessary to review these cases. The case before us presents a feature different from that in any other to which our attention has been called, or we have been able to find, and which has not been presented in argument. It has already been shown that the general provision of the act exempting the bonds themselves from "all taxation" was not sufficiently broad to include the tax involved herein. To this general provision there was added certain exceptions. Exceptions when properly and logically made narrow the provision to which they apply. The peculiar feature of the case before us is that it is claimed that by making the exception Congress, instead of limiting the general provision, actually enlarged it and made it apply to taxes other than those included in its terms. Such a construction we think is neither reasonable nor logical.

It is contended on behalf of plaintiff that the exemption clause is left without force or meaning unless it be construed so that it would apply to gift taxes. But this is not correct. The refusal to apply the construction contended for by plaintiff simply leaves the excepting clauses as they were. The inclusion in the exception of "estate or inheritance taxes" added nothing thereto, for such taxes were not included in the general provision and the effect of the other exceptions is not altered.

Nor do we see anything in the circumstances surrounding the passage of the law and the subsequent proceedings under which the bonds were issued that indicated a purpose on the part of Congress to make the bonds exempt from gift taxes. Gift taxes were not mentioned in the original statute for the obvious reason that none had been imposed at the time it was enacted. The provision that the bonds were not to be exempt from estate and inheritance taxes was probably inserted because the ordinary layman and even business men not familiar with legal distinctions might think the statutory provision exempting the bonds from "all taxation" would prevent the imposition of estate and inheritance taxes relating to them. Such provisions are often inserted

Syllabus

in a statute and when included in the statute are usually made a part of any Treasury statement made with reference to the issuance of the bonds. The bonds involved were not issued until after a gift tax had been enacted, but in inserting in the bonds and in circulars the language of the statute the Treasury simply followed the ordinary course.

The precise question involved in the case before us was presented to the Board of Tax Appeals in the case of *Lawrence C. Phipps* v. *Commissioner*, 34 B. T. A. 641. The majority of the Board in a decision promulgated June 2, 1936, held that the tax was not levied upon either the principal or interest of the bonds which constituted the gift involved in the case before it but was an excise on the transfer of the property to another. Citing *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust Co.* v. *Eisner*, 256 U. S. 345; *Bromley* v. *McCaughn*, *supra;* and *Plummer* v. *Coler*, 178 U. S. 115. A dissenting opinion was filed but we think the Board of Tax Appeals was clearly right in its conclusion.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

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## CLYDE H. JACOB, TRUSTEE IN BANKRUPTCY OF HAMPTON ROADS SHIPBUILDING CORPORATION v. THE UNITED STATES

[No. 43182. Decided November 9, 1936]

*On the Proofs*

*Contract for construction of lighthouse tender; cancellation of contract and completion by another contractor; claim of original contractor for retained percentages.*—Where a Government contract for construction of a lighthouse tender was canceled for delay by the contractor and the vessel completed by another contractor, the original contractor is entitled to recover such part of retained percentages withheld by the Government from progress payments under the original contract as is in excess of the amount of such percentages necessary to make the cost of the vessel to the Government the same as the original contract price for it.

*The Reporter's* statement of the case:

*Mr. Edmund D. Campbell* for the plaintiff. *Messrs. S. M. Brandt* and *W. V. Fentress*, and *Douglas, Obear, Morgan & Campbell* were on the brief.

*Mr. J. Robert Anderson*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

**1.** Plaintiff is the trustee in bankruptcy of Hampton Roads Shipbuilding Corporation, a corporation of the State of Virginia, having been duly appointed such trustee September 28, 1932.

**2.** On April 13, 1931, Hampton Roads Shipbuilding Corporation entered into a written contract with the United States, by G. R. Putnam, Commissioner of Lighthouses, for the construction and delivery to the defendant of a lighthouse tender, to be named "Lilac", for a consideration of $334,900. A copy of the contract is attached to the petition and made part hereof by reference.

**3.** The Hampton Roads Shipbuilding Corporation proceeded with the work and supplied labor and materials therefor in the amount and of the value of $133,960. The United States paid to the contractor two certain progress payments representing the value of the work done, less the retained percentage of 25 per cent thereof as provided in the contract.

The value of the work performed, the amounts and dates of payments on account thereof, and the amounts of retained percentages were as follows:

| Dates | Value | Paid | Retained |
|---|---|---|---|
| Dec. 10, 1931 | $66,980 | $50,235 | $16,745 |
| March 8, 1932 | 66,980 | 50,235 | 16,745 |
| Total | 133,960 | 100,470 | 33,490 |

**4.** The Hampton Roads Shipbuilding Corporation failed to prosecute the work with such due diligence as to insure the completion of the Lilac within the time stipulated in the contract. Thereupon, on June 20, 1932, the defendant,

pursuant to the terms of the contract, terminated the contractor's right further to proceed with the work.

**5.** On July 22, 1932, the defendant duly entered into a contract with The Pusey & Jones Corporation of Wilmington, Delaware, to complete the work of construction of the Lilac and of the contract therefor in consideration of the sum of $214,500. The Pusey & Jones Corporation proceeded with the completion of the work and completed it on August 11, 1933, and the Lilac was duly and finally accepted by the defendant and final payment made to The Pusey & Jones Corporation for its work October 12, 1933.

**6.** The following are the entire amounts expended by the defendant in connection with the construction and completion of the Lilac:

| | | |
|---|---|---|
| 1. Paid to Hampton Roads Shipbuilding Corporation prior to termination of its contract | | $100, 470. 00 |
| 2. Paid to The Pusey & Jones Corporation for completion | $214, 500. 00 | |
| Less credit for materials supplied by Hampton Roads Shipbuilding Corporation to The Pusey & Jones Corporation | 2,333. 31 | |
| | | 212, 166. 69 |
| 3. Miscellaneous expenses incurred by the United States for completion, in addition to sums paid to The Pusey & Jones Corporation | | 4, 459. 30 |
| Total | | 317, 095. 99 |

After completion of the Lilac there remains an unexpended balance of $17,804.01 from the original contract price, being the difference between the original contract price of $334,900 and the total of $317,095.99 expended by the United States for the entire construction, and no part of this difference of $17,804.01 has been paid to the plaintiff or to his bankrupt.

**7.** On January 17, 1935, plaintiff instituted suit in the United States District Court for the Eastern District of Virginia, to recover the sum of $22,263.31 alleged in the petition herein to be due from the percentage retained under the foregoing contract between Hampton Roads Shipbuilding Corporation and the United States, which action was subsequently dismissed by the court for want of jurisdiction.

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

Plaintiff's bankrupt, the Hampton Roads Shipbuilding Corporation, contracted with the defendant to construct and deliver a lighthouse tender, the "Lilac", for a consideration of $334,900. The contractor proceeded with the work and in the course thereof received two progress payments amounting to $100,470, the defendant, as it had a right to do, retaining 25%, $33,490, of a total of $133,960, otherwise due. The work was not prosecuted with the diligence necessary to insure completion within the agreed time, and the defendant in this situation exercised the contract right to terminate. The remainder of the work was relet to another contractor, at a price more advantageous to the United States and the entire work was completed at a total expended cost to the Government of $317,095.99, including the actual progress payments made to the original contractor, a sum less by $17,804.01 than the original contract price of $334,900. The plaintiff in his petition sought to recover a greater amount, but now limits his claim to the balance of the retained per cent on the estimated sum, viz $17,804.01.

In *Quinn* v. *United States*, 99 U. S. 30, a case similar in all respects to the instant case, the Supreme Court after holding that the first contractor was not entitled to the profits that he would have made had the contract been performed nor to the difference between the contract price and that at which the work was completed by others, said:

> But it is otherwise with regard to the ten percent of the price of the work completed, retained by the government.
>
> We have already seen that this was retained for the purpose of securing the completion of the work, and that if not completed by the contractor it was to be used in paying the expenses of such completion. In our view, it is a fair construction of this part of the agreement that the money retained under it is for security that the contractor will not abandon his work, but will proceed in it with due vigor, and for indemnity to the United States in case he fails to do this. Unless, therefore, the government has sustained some loss, some

pecuniary or legal damage by his failure, the money which he has fairly earned should be paid to him when the work which he agreed to do has been completed, though by others. In the case before us the United States made a clear gain of $33,000 by taking away his contract and making a new and more advantageous one with another person. Under such circumstances, the United States no longer has a right to the money withheld for indemnity and security, because the risk is over, the event has occurred, and instead of loss or damage there has been a gain by the transaction.

The plaintiff is entitled to recover the sum of $17,804.01. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

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## JOHN G. CUNNINGHAM v. THE UNITED STATES

[No. 43252. Decided November 9, 1936]

*On Plea to the Jurisdiction of the Court*

*Refund of purchase price of canceled coal land entry; statute of of limitation; accrual of cause of action.*—Where claims against the Government are payable upon approval by duly authorized officers of the Government, the statute of limitations runs on an approved claim from the date of such approval, and not from a subsequent rejection of the claim by the Comptroller General.

*Same;* Where a claim for refund of the purchase price of a canceled coal land entry was approved by the Secretary of the Interior but was subsequently disallowed by the Comptroller General, the statute of limitations ran on the claim from its approval by the Secretary, and not from the Comptroller General's disallowance.

*The Reporter's* statement of the case:

*Mr. Francis W. Clements* for the plaintiff.

*Messrs. Paul A. Sweeney* and *Henry A. Julicher*, with whom was *Mr. Assistant Attorney General James W. Morris*, for defendant.

The facts are sufficiently disclosed by the court's opinion.

GREEN, *Judge*, delivered the opinion of the court:

There is no dispute over the facts upon which the plea to the jurisdiction of the court is based.

Plaintiff sues to recover the sum of $1,592.01, the amount paid by him to the defendant as the purchase price of a coal land entry. This entry was subsequently canceled by proper officers and the plaintiff made application to the Secretary of the Interior for refund of the purchase price. This application was approved by the Secretary on September 17, 1929, on the ground that the coal entry had been erroneously allowed and could not be confirmed because of fatal defects appearing on the face of the papers. The Comptroller General, however, on January 29, 1930, reversed the allowance of the claim by the Secretary of the Interior on the ground that the charges against the entry of plaintiff also included those of illegality and fraud and that such charges had been sustained. Acting under the decision of the Comptroller General, the General Land Office under date of February 8, 1930, denied the claim of the plaintiff for refund.

The Secretary of the Interior had authority to approve the claim of the plaintiff and he did so approve it. Both parties agree that the Comptroller General had no power to reverse this action of the Secretary of the Interior. The plaintiff contends that the claim having been sent to the Comptroller General's office for approval and that official having failed to approve it, no cause of action accrued until after his decision. But we held in *Electric Boat Co.* v. *United States*, 81 C. Cls. 361, that where a claim has been approved by a duly authorized officer the rejection of the claim by the Comptroller General does not toll the running of the statute of limitations. The precise question involved in this case has, we think, been ruled upon by the Supreme Court in *Globe Indemnity Co.* v. *United States*, 291 U. S. 476. Much of the opinion in that case is devoted to the question of whether what is referred to as the "Heard Act" changed the general rule as to the authority of the Comptroller General and it was held that it did not. But before proceeding to discuss

this branch of the case, the court considered the Budget and Accounting Act which created the office of the Comptroller General and defined his powers. With reference to his authority, the court said:

> The function which he exercises in auditing and settling claims against the government is precisely that which was previously exercised by the Accounting Office in the Treasury Department. Before, as after, the Budget and Accounting Act, claims against the United States might be paid from the proper appropriation upon approval of the authorized officer of the department concerned, without previous settlement or audit by the accounting office.

In further considering the case before it, the Supreme Court held in effect that the decision of a duly authorized officer approving a claim constituted a final settlement and that cases begun under the Heard Act constituted no exception to this rule. It is clear that plaintiff's cause of action was established when the Secretary of the Interior allowed his claim and he had six years thereafter in which to commence suit. Unfortunately, he waited until almost six years after the Comptroller General had made his decision and his action is therefore barred by the statute of limitations.

The case is a peculiar and unfortunate one as it seems that plaintiff had a meritorious claim which had been allowed and ought to have been paid, but we can only decide the legal questions. For relief on the ground that a moral obligation exists to return the sum paid by plaintiff, application must be made to Congress.

The petition will have to be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

# CASES DECIDED

IN

# THE COURT OF CLAIMS

April 6, 1936, to December 6, 1936

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

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No. 41905. FEBRUARY 3, 1936. MOTION FOR NEW TRIAL OVERRULED OCTOBER 5, 1936

*Philadelphia Rapid Transit Co.*

Interest on income and profits tax overpayment. Judgment for $193,283.54. Opinion, 81 C. Cls. 289.

No. D–863. APRIL 6, 1936

*Letizia Cameretti Castellano et al.*

Ocean freight money deposited with and withheld by United States Shipping Board. Findings of fact, conclusion of law, and judgment for $55,944.04, on authority of *Giuseppe Sanguineti et al.* v. *United States*, *ante*, p. 1.

No. 42902. APRIL 6, 1936

*Harry N. Rising.*

Army pay; balance of pay as instructor at West Point Military Academy; lack of appropriation. Judgment for $748.89, on authority of *Wilson* v. *United States*, 77 C. Cls. 630, and *Reed* v. *United States*, 78 C. Cls. 834.

No. 42817. APRIL 6, 1936

*Clarence H. Pike.*

Rental and subsistence allowances, Navy officer; dependent mother. Findings of fact and conclusion of law; petition dismissed, dependency not proven.

No. 43067. April 6, 1936

*James E. Arnold.*

Money and services furnished Mississippi Choctaw Indians. Petition dismissed on demurrer, on authority of *McCalib* v. *United States*, *ante*, p. 79.

No. D-862. April 6, 1936

*Emanuele Bozzo.*

Ocean freight charges deposited with and withheld by United States Shipping Board. Findings of Fact, conclusion of law, and judgment for $50,639.26, on authority of *Giuseppe Sanguineti et al.* v. *United States*, *ante*, p. 1.

No. 42599. April 6, 1936

*Kenneth M. Gentry.*

Rental and subsistence allowances, Navy officer; dependent mother. Findings of fact, conclusion of law, and judgment for $1,127.72.

No. 42983. April 6, 1936

*David B. Overfield.*

Rental and subsistence allowances, Navy officer; dependent mother. Findings of fact, conclusion of law, and judgment for $4,075.69.

No. 42514. April 6, 1936

*Industrial Trust Co. et al., Extrs., Estate of William M. Greene.*

Refund of estate tax. Judgment for $756.00, with interest, on mandate of Supreme Court reversing Court of Claims. *See* 80 C. Cls. 647; 82 C. Cls. 698; 296 U. S. 220.

No. 42695. April 6, 1936

*Ewing Hill.*

Refund of income tax. Judgment for $14,230.11, with interest. Opinion, 82 C. Cls. 210.

No. 42869. APRIL 6, 1936

*Frederick A. Ruf.*

Rental and subsistence allowances, Navy officer; dependent mother. Judgment for $9,476.64. *See* 82 C. Cls. 693.

No. 42401. MAY 4, 1936

*Osgood C. McIntyre.*

Rental and subsistence allowances, Army officer; dependent mother. Findings of fact and conclusions of law. Plaintiff entitled to recover on his petition, and defendant on its counterclaim. Judgment suspended pending report of General Accounting Office showing amount due plaintiff, if any, in excess of the amount due defendant on its counterclaim.

No. 42861. MAY 4, 1936

*J. A. Jones Construction Co.*

Contract for construction of foundation for courthouse; damage resulting from Government delays. Findings of fact, conclusion of law, and judgment for $3,432.85, citing *Crook* v. *United States*, 59 C. Cls.. 348; *Donnell-Zane Co.* v. *United States*, 75 C. Cls. 368; and *United States* v. *Mueller*, 113 U. S. 153.

No. 43023. MAY 4, 1936

*John Conboy.*

Transportation of Navy officer's dependents. Findings of fact and conclusion of law; petition dismissed.

No. H-466. JUNE 1, 1936

*New Process Gear Co., Inc.*

Refund of excise tax on gears for motor vehicles. Findings of fact and conclusion of law; petition dismissed. *See United States Gear Corporation, ante*, p. 415.

No. 43156. JUNE 1, 1936

*Indemnity Insurance Co. of North America.*

Loss as surety on Government contract. Dismissed on demurrer to petition.

No. 42797. JUNE 1, 1936

*Roland O. Lucier.*

Rental and subsistence allowances, Navy officer; dependent mother. Judgment for $2,952.59. *See* 81 C. Cls. 967.

No. 42843. NOVEMBER 9, 1936

*Edward Sweeney.*

Rental and subsistence allowances, Navy officer. Judgment for $6,570.51. Opinion, 82 C. Cls. 640.

No. 42863. NOVEMBER 9, 1936

*Albert R. Klein.*

Refund of estate tax on property in hands of Alien Property Custodian. Findings of fact and conclusion of law. Petition dismissed on authority of *Krausz et al.* v. *United States*, *ante*, p. 187.

No. 43192. NOVEMBER 9, 1936

*Lawrence B. Morris.*

Transportation of Army officer's dependents. Findings of fact, conclusion of law, and judgment for $306.08, on authority of *Bullard* v. *United States*, 66 C. Cls. 264, and *Henry* v. *United States*, 74 C. Cls. 527.

No. 42923. NOVEMBER 9, 1936

*Michael Standerson.*

Difference in pay, Army. Judgment for $5,745.20. Opinion, *ante*, p. 633.

No. 43158 NOVEMBER 9, 1936

*William Cox.*

Transportation of Navy officer's dependent. Findings of fact, conclusion of law, and judgment for $135.50, on authority of *Bullard* v. *United States*, 66 C. Cls. 264, and *Henry* v. *United States*, 74 C. Cls. 527.

No. 43137. NOVEMBER 9, 1936

*John O'Brien.*

Retired pay of officer in Philippine Scouts. Findings of fact and conclusion of law; plaintiff entitled to recover. Judgment suspended pending report of General Accounting Office showing amount due plaintiff.

COTTON LINTER CASES

In the following cases involving claims for damages for breach of World War contracts for cotton linters, judgments against the Government were rendered as indicated, on authority of *Farmers & Ginners Cotton Oil Co.* v. *United States*, 76 C. Cls. 294, following *Hazelhurst Oil Mill & Fertilizer Co.* v. *United States*, 70 C. Cls. 334, and *Hartsville Oil Mill* v. *United States*, 271 U. S. 43.

APRIL 6, 1936

No. 17374, Congressional. Julius F. Glass, Trustee of Farmers Cotton Oil & Trading Co., W. B. Potts et al., lessees, $5,341.90.

No. 17383, Congressional. Swift & Company Oil Mill, $15,152.46.

No. 17386, Congressional. Swift & Company Oil Mill, $22,561.55.

No. 17437, Congressional. Myron C. Stockbridge, Liquidator of Henderson Cotton Oil Co., $32,187.95.

No. 17470, Congressional. Winona Oil & Manufacturing Co., $12,988.77.

No. 17487, Congressional. New Bern Cotton Oil & Fertilizer Mills, to use of New Bern Oil & Fertilizer Co., $24,623.52.

No. 17496, Congressional. Ardmore Oil & Milling Co., to use of Choctaw Cotton Oil Co., $5,033.52.

No. 17499, Congressional. Durant Cotton Oil Co., to use of Choctaw Cotton Oil Co., $3,284.45.

No. 17503, Congressional. Choctaw Cotton Oil Co., Successor to Osage Cotton Oil Co., $62,206.21.

No. 17504, Congressional. Choctaw Cotton Oil Co., Successor to Florida Cotton Oil Co. and Osage Cotton Oil Co., $498.37.

No. 17516, Congressional. Swift & Company Oil Mill, $29,069.25.

No. 17544, Congressional. Central Oil Mills, $9,669.35.

No. 17600, Congressional. Palestine Oil & Manufacturing Co., to use of East Texas Cotton Oil Co., $5,265.42.

MAY 4, 1936

No. D-1071. Charles A. Alling, trading as Greenville Cotton Oil Mill, to use of American Food Products Co., $13,929.26.

No. 17345, Congressional. Charles A. Alling, trading as Forrest City Cotton Oil Mill, to use of American Food Products Co., $12,945.45.

No. 17351, Congressional. Charles A. Alling, trading as Pine Bluff Cotton Oil Mill, to use of American Food Products Co., $20,457.84.

No. 17553, Congressional. Arthur Giesecke, Liquidating Trustee of Ballinger Oil Mill, $2,722.12.

No. 17622, Congressional. Arthur Giesecke, Trustee of Winters Oil Mill, $3,355.12.

JUNE 1, 1936

No. D-1081. Riverside Cotton Oil Co., to use of Sydney Webb and John Rider, $10,597.58.

No. 17361, Congressional. Home Oil Mill, $17,125.90.

No. 17392, Congressional. W. D. Sheppard and F. E. Gober, Surviving Lessees of Farmers Oil Mill, $4,912.10.

No. 17404, Congressional. Hazelhurst Cotton Oil Mill, $5,596.26.

No. 17418, Congressional. Citizens and Southern National Bank, Receiver of Washington Cotton Oil Co., $12,108.56.

No. 17475, Congressional. Eric Norfleet, Receiver of Bertie Cotton Oil Co., $3,051.67.

No. 17519, Congressional. T. D. Wood, Surviving Liquidating Trustee of Fountain Inn Oil Mill Co., $11,170.52.

No. 17615, Congressional. R. L. Batte, trading as Thorndale Oil Mill, $1,813.27.

No. 17621, Congressional. Zellner Eldridge, Receiver of Whitesboro Cotton Oil Co., $9,853.02, less $422.33 unpaid income tax with interest.

JUNE 8, 1936

No. D–1108. Cebron O. Watts, Receiver of New Roads Oil Mill & Manufacturing Co., $20,551.93.
No. 17440, Congressional. Grenada Oil Mills, to use of Mississippi Cottonseed Products Co., $9,005.31.
No. 17449, Congressional. Grenada Oil Mills, to use of Mississippi Cottonseed Products Co., $4,508.48.
No. 17452, Congressional. Meridian Fertilizer Factory, to use of Whitney National Bank, Trustee, $10,385.17.

## CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

*Cases Pertaining to Refund of Taxes*

ON APRIL 6, 1936

K–253. Douglas H. Sprunt.
M–259. Cement Gun Co., Inc.
41907. Farmers Elevator Co., Scranton, Iowa.
41920. Duveen Brothers, Inc.
41985. Arthur M. J. Gibbons et al., Executors of Estate of M. J. Gibbons, decd.
42380. Farmers Cooperative Association, Verdigre, Nebr.
42381. Farmers Union Cooperative Co., Guide Rock, Nebr.
42383. Farmers Cooperative Mercantile Assn., Petersburgh, Nebr.
42384. Farmers Union Cooperative Assn., Blue Hill, Nebr.
42385. Farmers Union Cooperative Assn., Neligh, Nebr.
42386. Farmers Union Cooperative Grain and Livestock Assn., Tekamah, Nebr.
42457. Dalton Cooperative Society, Dalton, Nebr.
42488. Miami Townsite Co.
42490. Emily Earle Wilson, Individually and as Executrix of Estate of George B. Wilson, decd.
42672. Security-Peoples Trust Co. et al., Executors of Baley B. Nagle, decd.
42897. William Bridges Thayer.

ON MAY 4, 1936

K–318. The O. Armleder Motor Truck Co.
41956. Belle Kuppenheimer.
42039. Lake View Trust & Savings Bank.
42646. Richard Harry Wagner et al., Extrs., Louis J. Reyersback, decd.
42964. Walter Perry, Receiver for Broadway Bank and Trust Co.
43116. Pervical E. Foerderer et al. Extrs., Caroline Foerderer Artman, decd.

ON JUNE 1, 1936

M–165. Annemarie Forstmann Barbey.
M–166. Herbert Forstmann.
M–167. Mrs. Ellen Forstmann Wilhelmi.
M–168. Albrecht Forstmann.
M–169. Richard Forstmann.
M–170. Bruno Forstmann.
M–171. Gunther Forstmann.
M–172. Fritz Forstmann.
M–173. Klaus Forstmann.
M–174. Dr. Johann Forstmann, Admr. of Estate of Auguste Forstmann, decd.
M–175. Albrecht Forstmann et al., Heirs, etc., of Alma Forstmann, decd.
42404. Loftis Bros. & Co.
42506. The Morris Plan Bank of Cleveland.
42798. J. G. Curtis Leather Co.
42936. Citizens Gas Company.
42937. Mary C. Brady.

ON JUNE 5, 1936

M–433. American Trading Co.
42446. Columbus Blank Book Mfg. Co.

ON JUNE 29, 1936

41842. Ford Motor Company, Inc.
42918. The American Tobacco Co.
43026. United Pocahontas Coal Co., Inc.

ON OCTOBER 5, 1936

K–435. Backus Brooks Co.
L–401. Union Trust Co., Admr. of Estate of Albert William Ellenberger, decd.
M–127. Marcus Greenwood et al., Trustees of Greenwood Associates.
M–275. Elizabeth Huffman et al., Heirs, etc., of Maria Huffman, Sole Heir of Albert Huffman, decd.
M–276. Mathilde Huffman.
M–277. Frieda Huffman.
M–278. Gustav Huffman.
M–279. Alfred Huffman.
M–280. Walter Huffman.
M–281. Elizabeth Huffman.
42121. Boston Automobile Co., formerly Boston Oldsmobile Co.
42413. Preston County Coke Co.
42801. T. H. Barton.
42813. Van Duzee Field.
42814. Fred F. Ingram.
42815. Leonard H. Field, III.
42961. Whitehall Lunch Club.
43109. Lefcourt Realty Corp.

ON NOVEMBER 9, 1936

41889. Farmers Union Cooperative Association, Wisner, Nebr.
41954. Hobart Iron Company.
42032. Wolverine Petroleum Corporation.
42609. Ideal Foundry & Machinery Co., formerly Knott & Harker Co.
42674. Howard E. Shore et al., Liquidating Trustees of Wolfenden, Shore & Co., Inc.
42793. Howard E. Shore et al., Liquidating Trustees of Cardington Land Co., Inc.

ON NOVEMBER 10, 1936

42425. J. P. Houck Tanning Co.

## *Cases Involving Pay and Allowances*

ON APRIL 6, 1936

M-27. J. F. Neuberger.
42785. Norman C. Gillette.

ON JUNE 1, 1936

M-69. Seth P. Batchelder.
M-70. Charles E. Gibson.

ON OCTOBER 5, 1936

42146. William A. Barcus.
42158. David O. Bowman.
42263. George R. Oster.

ON NOVEMBER 9, 1936

42165. Joseph Carhart, Jr.
42181. Alfred C. Flather.
42194. Fred R. Hazleton.
42219. Harold D. Justison.
42243. R. A. MacDonell.
42288. Archibald J. Sherlock.
42292. Frank W. Southworth.
42334. Frank L. Young.
43282. Central Hanover Bank & Trust Co. of New York et al., Admrs. of Fidelio S. Carter, decd.

## *Miscellaneous Cases*

ON MAY 4, 1936

43140. Herbert M. Baruch Corporation. Breach of Contract.
43230. Ferdinand Fah. Value of First Liberty Loan bond on basis of 1917 standard gold dollar.

ON JUNE 1, 1936

168. Departmental, Thompson & Kelly Co. Sale of surplus Government property.

ON JUNE 3, 1936

C-287. Laura T. Pancoast. Damage from Aberdeen Proving Ground.

ON JUNE 29, 1936

43036. American Airways, Inc. Air mail transportation.
Colonial Air Transport, Inc.
Robertson Aircraft Corporation.
Continental Air Lines, Inc.
Colonial Western Airways, Inc.
Texas Air Transport, Inc.
Gulf Coast Airways, Inc.
Embry-Riddle Company.
Thompson Aeronautical Corporation.
Interstate Airlines, Inc.
43037. American Airways, Inc. Air mail transportation.
43045. Transcontinental & Western Air, Inc. Air mail transportation.
43048. Western Air Express, Inc. Air mail transportation.
43049. Northwest Airways, Inc. Air mail transportation.

ON OCTOBER 5, 1936

42819. American Scantic Line. Transportation of mails.
43072. C. S. Hudson, Admr. of Estate of Louis P. Hudson, decd. Services and expenses for Mississippi Choctaws.

ON NOVEMBER 9, 1936

43068. Katherine H. Thompson, Extrx. of Chester Howe, decd. Services and expenses for Mississippi Choctaws.
43069. John C. Vernon et al., Sole Heirs of William N. Vernon, decd. Services and expenses for Mississippi Choctaws.
43070. Sue Toles et al., Heirs of John W. Toles, decd. Services and expenses for Mississippi Choctaws.
43071. Jeanie Beckham Prewitt, Sole Heir of J. J. Beckham, decd. Services and expenses for Mississippi Choctaws.
43073. Mary Pierce Gillett et al., Sole Heirs of Joseph W. Gillett, decd. Services and expenses for Mississippi Choctaws.
43079. Allen H. Bounds, et al., Extrs. of T. A. Bounds, deed. Services and expenses for Mississippi Choctaws.
43080. Joseph H. Neill, Surviving Partner of Sullivan & Neill. Services and expenses for Mississippi Choctaws.
43201. King Solomon Mines Co. Difference between market value and the amount paid plaintiff for gold bullion surrendered to the Government Sept. 18, 1933, under act of March 9, 1933.

# ABSTRACT OF DECISIONS

## OF

# THE SUPREME COURT

### IN COURT OF CLAIMS CASES

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## TROJAN POWDER CO. v. UNITED STATES

[82 C. Cls. 312; 298 U. S. 674]

Petition for writ of certiorari *denied* by the Supreme Court May 18, 1936.

## UNITED STATES v. ATLANTIC MUTUAL INSURANCE CO.

[80 C. Cls. 11; 298 U. S. 483]

Certiorari to review a judgment of the Court of Claims on a claim in general average contribution against the United States.

Judgment was rendered in favor of the plaintiff in the Court of Claims. Upon certiorari the judgment was reversed May 25, 1936, the Supreme Court deciding:

1. A claim of contribution in general average presented against the United States by suit in the Court of Claims filed more than 6 years after the claim first accrued, is barred by U. S. C., title 28, section 262.
2. The right to contribution in general average accrues when all the elements essential to its existence are present, regardless of whether the appropriate means of enforcement be a suit *in rem* or a suit *in personam*.
3. The right to contribution in general average accrues and becomes enforceable upon the arrival of the ship at port of destination and delivery of the cargo, even though the amount of the required contribution has not then been liquidated.
4. Claims against the United States for general average contribution are brought and adjudicated in the Court of Claims under U. S. C., title 28, section 250 (1). The claim may accrue and be sued on even though the damages sought be unliquidated.

5. An adjuster, engaged by a ship-owner to make up a general average statement, is not an arbitrator nor is his statement binding, as an account stated or otherwise, upon his principal.

Mr. Justice Van Devanter delivered the opinion of the court.

## DIXIE TERMINAL CO. v. UNITED STATES

[Decided June 1, 1936, 298 U. S. 645]

On certificate from the Court of Claims certifying questions to the Supreme Court. Upon motion the certificate was dismissed, citing *Jewell* v. *Knight*, 123 U. S. 426; *Cross* v. *Evans*, 167 U. S. 60; *Mantle Lamp Co.* v. *Aluminum Products Co.*, 297 U. S. 638; *Smith, Collector*, v. *Ajax Pipe Line Co.*, 298 U. S. 641, and other cases.

## GLOBE GAZETTE PRINTING CO. v. UNITED STATES

[82 C. Cls. 586; 298 U. S. 682]

Petition for writ of certiorari *denied* by the Supreme Court June 1, 1936.

## CERRO DE PASCO COPPER CORP. v. UNITED STATES

[82 C. Cls. 442; 298 U. S. 686]

Petition for writ of certiorari *denied* by the Supreme Court June 1, 1936.

## CONTINENTAL OIL CO. v. UNITED STATES

[*Ante*, p. 344; 299 U. S. 510]

Petition for writ of certiorari *dismissed*, without prejudice, as premature, October 12, 1936.

## NATIONAL FOODS, INC., v. UNITED STATES

[82 C. Cls. 627; 299 U. S. 544]

Petition for writ of certiorari *denied* by the Supreme Court October 12, 1936.

## A. M. MARRET, ADMR., ET AL. v. UNITED STATES

[82 C. Cls. 1; 299 U. S. 545]

Petition for writ of certiorari *denied* by the Supreme Court, October 12, 1936.

## AMERICAN NATURAL GAS CO. v. UNITED STATES

[82 C. Cls. 300; 299 U. S. 547]

Petition for writ of certiorari *denied* by the Supreme Court, October 12, 1936.

## EASTERN OR EMIGRANT CHEROKEES v. UNITED STATES

[82 C. Cls. 180; 299 U. S. 551]

Petition for writ of certiorari *denied* by the Supreme Court, October 12, 1936.

## EASTERN OR EMIGRANT CHEROKEES AND WESTERN OR OLD SETTLER CHEROKEES v. UNITED STATES

[82 C. Cls. 691; 299 U. S. 552]

Petition for writ of certiorari *denied* by the Supreme Court, October 12, 1936.

## OLIVER TYPEWRITER CO. v. UNITED STATES

[*Ante*, p. 235; 299 U. S. 567]

Petition for writ of certiorari *denied* by the Supreme Court, October 12, 1936.

## WESTERN WHEELED SCRAPER CO v. UNITED STATES

[82 C. Cls. 646; 299 U. S. 569]

Petition for writ of certiorari *denied* by the Supreme Court, October 12, 1936.

## UNITED STATES v. FRANK H. GAGE, SURVIVING PARTNER

[*Ante*, p. 381; 299 U. S. 571]

Petition for writ of certiorari *denied* by the Supreme Court, October 12, 1936.

## KARL J. KRUEGER v. UNITED STATES

[*Ante*, p. 412; 299 U. S. 541]

Petition for writ of certiorari *denied* by the Supreme Court, October 12, 1936.

## GERTRUDE VANDERBILT WHITNEY ET AL., EXTRS. v. UNITED STATES

[*Ante*, p. 604; 299 U. S. 576]

Petition for writ of certiorari *denied* by the Supreme Court, October 12, 1936.

## JEFFERSON & CLEARFIELD COAL & IRON CO. v. UNITED STATES

[*Ante*, p. 491; 299 U. S. 581]

Petition for writ of certiorari *denied* by the Supreme Court, October 19, 1936.

## EASTMAN KODAK CO. v. UNITED STATES

[82 C. Cls. 504; 299 U. S. 581]

Petition for writ of certiorari *denied* by the Supreme Court, October 19, 1936.

## PHILIP A. SCHOLL v. UNITED STATES

[82 C. Cls. 606; 299 U. S. 592]

Petition for writ of certiorari *denied* by the Supreme Court, November 9, 1936.

## INDEX DIGEST



I. Until the law made provision for the return of property of aliens seized during the World War and held by the Alien Property Custodian, such aliens had no enforceable rights or interest in the property or against the Government by reason of the property's being so held. *Krausz et al.*, 187.

II. In returning the property seized by the Alien Property Custodian, the Government had the right to impose such terms and conditions as it pleased Congress to enact, and there is no reasonable doubt that the intention of Congress was to return only the corpus of the property remaining after the payment therefrom of taxes and other expenses. *Id.*

SHIPPING BOARD.

I. The comprehensive authority conferred upon the chartering committee created by the United States Shipping Board under authority of the act of July 18, 1918, and the President's proclamation of July 29, 1918, pursuant thereto, did not limit the committee's actions to inflexible rules and regulations, nor render its approvals or disapprovals of charter parties, as well as its fixing of charter-party freight rates, irrevocable; the committee possessed sufficient authority to meet emergency situations arising in the course of the performance of its duties. *Sanguineti*, 1.

II. Where a vessel belonging to a citizen of Italy, and under charter to a citizen of Denmark, arrived in the harbor of New York in October 1918, with a cargo from Africa which could not be discharged by the vessel for the reasons that the owner did not have the required import license, the charter party had not been approved by the proper United States authorities and a balance of freight charges secured by a lien on the cargo had not been paid, it was within the authority of the chartering committee created by the United States Shipping Board under the act of July 18, 1918 and the President's proclamation of July 29, 1918, pursuant thereto, to enter into an agreement for approval of the charter party and discharge of the cargo upon deposit with it of the freight charges due, for their proper and lawful disposition; and where the freight charges so deposited were turned over by the committee to the

TAXES—Continued.

final decision was reached as to the correct tax liability, or which of certain alternative courses should be pursued in the premises, is left by the statutes wholly to the Commissioner of Internal Revenue, and his decision is not reviewable by the court. *Foundation Co.* 513.

LXII. Where the Commissioner of Internal Revenue was considering the plaintiff's tax liability for several different but related years, and not being able to finally determine the correct liability for one of the years within the time limitation for assessment, made an immediate jeopardy assessment for such year for the sole purpose of saving the right of assessment and collection, the assessment was valid and not subject to judicial review as arbitrary because of a 60-day deficiency notice not having been given. *Id.*

LXIII. The taxpayer was not deprived of any legal rights in respect of its taxes for the years involved by the jeopardy assessment under section 274 (d) of the Revenue Act of 1924 to avoid the bar of the time limitation on assessment; and the legality of the assessment was not affected by the fact that bond was necessary to obtain review by the Board of Tax Appeals. *Id.*

LXIV. While the Commissioner of Internal Revenue might give the taxpayer 60-day jeopardy deficiency notice of additional assessment under section 274 (d) of the Revenue Act of 1924, it was not contemplated by the statute that the Commissioner should give such notice in cases where he had not completed his audit and made a considered determination as to the tax liability for the year involved. *Id.*

LXV. In the provisions of section 238 (a) of the Revenue Act of 1918 for credit against income for taxes paid by a domestic corporation to a foreign country, the word "paid" means paid or accrued; but the act provided a different rule with respect to credit for taxes paid by a foreign subsidiary of a domestic corporation, taxes in such a case accrued but not paid being specifically excluded as a credit by the statute. *Id.*

LXVI. The Revenue Act of 1921 provided a different rule with respect to credit of taxes paid a foreign country against income of a domestic taxpayer from the rule provided by the Revenue Act of 1918, but was not retroactive and therefore had no application to taxes for the year 1920. *Id.*

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